Before the Arbiter for Financial Services

Sitting of the 28 July 2020

Case No. 028/2018, NE

Case No. 036/2018, DL

Case No. 040/2018, IH

Case No. 043/2018, LS

Case No. 052/2018, RW

Case No. 068/2018, EL

Case No. 070/2018, HL

Case No. 072/2018, NA

Case No. 080/2018, LR

Case No. 081/2018, DL

Case No. 090/2018, UL

Case No. 091/2018, UL

Case No. 092/2018, SL

Case No. 093/2018, CO

Case No. 095/2018, NN

Case No. 102/2018, AM

Case No. 103/2018, IC

Case No. 104/2018, GR

Case No. 105/2018, RO

Case No. 106/2018, RS

Case No. 108/2018, LY

Case No. 109/2018, CR

Case No. 116/2018, NV

Case No. 118/2018, VO

Case No. 127/2018, GH

Case No. 128/2018, OR

Case No. 130/2018, RG

Case No. 138/2018, LW and RW

Case No. 140/2018, HN

Case No. 167/2018, TE

Case No. 171/2018, LN

Case No. 172/2018, GN

Case No. 184/2018, LR

Case No. 034/2019, GL

Case No. 035/2019, VB

Case No. 036/2019, BB

Case No. 045/2019, RN

Case No. 050/2019, VM

Case No. 072/2019, AN

(altogether referred to as 'the Complainants')

vs

Momentum Pensions Malta Limited (C52627)

('MPM' or 'the Service Provider' or 'the Retirement Scheme Administrator')

The Arbiter,

PRELIMINARY

The Office of the Arbiter for Financial Services (OAFS) received over 55 cases against the Service Provider all related to their personal pension scheme of which the Service Provider was the Retirement Scheme Administrator and Trustee. In order to establish the facts of each case and hear the submissions individually, the Arbiter appointed each case for hearing and invited the parties to make their submissions.

After this process, the Arbiter came to the conclusion that the captioned cases are intrinsically similar in nature and consequently it is deemed fit to treat the said cases together in terms of Article 30 of Chapter 555 of the Laws of Malta which provides that:

'*The Arbiter may, if he thinks fit, treat individual complaints made with the Office together, provided that such complaints are intrinsically similar in nature*.'

The purpose behind this provision is to avoid repetition and to offer an opportunity to the Arbiter to decide intrinsically similar cases expediently in the best interests of the parties themselves. Furthermore, the law urges the Arbiter to conclude cases '*in an economical and expeditious manner*'.[1]

The other cases not being dealt with in this decision will be decided separately because of certain particularities that need to be addressed separately.

The Cases in question

The **Complaints** made against Momentum Pensions Malta Limited ('MPM' or 'the Service Provider') relate to the Momentum Malta Retirement Trust ('the Retirement Scheme' or 'Scheme'), this being a personal retirement scheme licensed by the Malta Financial Services Authority ('MFSA'). The Retirement Scheme is established in the form of a trust and administered by MPM as its Trustee and Retirement Scheme Administrator. The Complainants were all

[1] Cap. 555, Art. 19(3)(d).

Members of the Retirement Scheme, each having an account with the Scheme and their own particular underlying investment portfolio.

The Complaint made by the Complainants, in essence, revolves around the claim that the Complainants experienced a loss on their respective Retirement Scheme due to MPM not having adequately carried out its duties, as Retirement Scheme Administrator and Trustee of the Scheme, in line with the applicable requirements.

The Complaints are considered to be intrinsically similar as they relate to *inter alia* similar circumstances, including:

a) the same situation involving the time when Continental Wealth Management ('CWM') was the indicated investment adviser of the Complainants in relation to the underlying investments of the Retirement Scheme;

b) the same structure, where the Member's underlying investment portfolio comprised substantial investments into structured notes;

c) common alleged principal failures made against MPM.

The Complainants have, in essence, all raised one or more of the following principal alleged failures against MPM, namely that:

1. MPM accepted business and/or allowed the appointment of CWM as an unlicensed investment adviser;

2. MPM allowed an unsuitable portfolio of underlying investments to be created within the Retirement Scheme which portfolio comprised high risk structured products of a non-retail nature which was not in line with the applicable conditions relating to the portfolio composition and/or which was not in line with their risk profile;

3. MPM provided inadequate and/or lack of information to them as Members of the Retirement Scheme.

Other recurrent common aspects raised by various complainants - such as the claim that MPM accepted investments which were not authorised by the complainants where, in essence, it was alleged that the signatures on the

dealing investment instruction forms were forged, scanned or photocopied[2] - will also be referred to in this case as and where appropriate and duly qualified according to the respective cases.

The Complainants requested their respective Retirement Scheme to be restored back to its original value.[3]

Some of the Complainants, namely in Cases 036/2018, 040/2018, 068/2018, 070/3018, 072/2018, 080/2018, 090/2018, 091/2018, 092/2018, 093/2018, 105/2018, 108/2018, 109/2018, 116/2018, 127/2018, 128/2018, 130/2018, 140/2018, 035/2019, 036/2019, 045/2019 and Case 072/2019, also requested payment of interest for loss of annual growth and/or other additional compensation.

In addition to restoring the Retirement Scheme back to its original value, the complainants in Cases 028/2018, 052/2018, 070/2018, 090/2018, 091/2018, 104/2018, 105/2018, 116/2018, 127/2018, 128/2018 and Case 138/2018 requested also exit fees and penalties to be waived in respect of a transfer out from the Scheme.

In its reply, MPM essentially submitted the following:

1. That MPM is licensed by the Malta Financial Services Authority to act as the Retirement Scheme Administrator ('RSA') and Trustee of the Scheme That the Scheme is license as a Personal Retirement Scheme.

2. That Continental Wealth Management ('CWM') is a company registered in Spain. Before it ceased to trade, CWM acted as adviser and provided financial advice to investors. CWM was authorised to trade in Spain and in France by Trafalgar International GmbH ('Trafalgar'). Global Net Limited ('Global Net'), an unregulated company, is an associate company of Trafalgar and offers administrative services to entities outside the European Union.

[2] Such allegation relating to the signatures on the dealing instructions was made in all the indicated captioned cases except for Case 072/2018, 093/2018, 130/2018, 167/2018, 171/2018, 172/2018 and Case 072/2019.
[3] This is with the exception of Case 081/2018, where the complainants in such case requested MPM to accept responsibility for the loss of 80% of their capital investment.

3. That MPM is not linked or affiliated in any manner to CWM, Trafalgar or Global Net.

4. That MPM is not licensed to provide investment advice.

5. For some of the cases, namely Case 070/2018, 072/2018, 105/2018, 106/2018, 108/2018, 109/2018, 116/2018, 118/2018, 127/2018, 128/2018, 130/2018, 138/2018, 140/2018, 167/2018, 171/2018, 172/2018, 184/2018, 034/2019, 035/2019, 036/2019, 045/2019, 050/2019 and Case 072/2019, MPM raised the plea that the complaint relates to conduct which occurred before the entry into force of Chapter 555 of the Laws of Malta on 18 April 2016.

   In this regard, MPM referred to the date (being after 18 April 2018) when the complaint was filed with the OAFS and argued that this was beyond the two-year time period allowed by Article 21(1)(b) of the said law.

   In respect of the same cases, the Service Provider further submitted that if the Arbiter determines that the conduct complained of is conduct which occurred after the entry into force of Cap. 555, the complaint still cannot be entertained pursuant to Article 21(1)(c) as more than two years have lapsed since the conduct complained of took place.

6. For some of the cases, namely, Case 036/2018, 040/2018, 052/2018, 068/2018, 080/2018, 081/2018, 090/2018, 091/2018, 092/2018, 093/2018, 095/2018, 102/2018, 103/2018 and Case 104/2018, MPM only raised the plea that, without prejudice to MPM's defence that it is not responsible for the complainants' claims, more than two years have lapsed since the conduct complained of took place, and therefore, pursuant to Article 21(1)(c) of Chapter 555 of the Laws of Malta, it submitted that the respective complaint cannot be entertained.

7. MPM submitted that CWM was appointed by the Complainants and in certain instances[4] also referred to the declaration in the application form for membership of the Scheme signed by the adviser wherein the adviser

[4] Such as in Case 036/2018; Case 040/2018

confirmed the suitability of the underlying investment and that the investment advice is within the investment guidelines.

8. MPM also raised the plea that it was not aware of any attempt by the Complainants' to initiate proceedings against CWM or its officials and/or Trafalgar International GmbH ('Trafalgar') and/or Global Net Limited ('Global Net'), which advised the respective complainant to invest in products which have led to the losses.

9. MPM noted that CWM ceased trading and is no longer operating and that this was the only reason why the Complainants' filed a claim against MPM and not against CWM. The Service Provider submitted that the proper respondent to this claim was CWM and/or Trafalgar.

10. With respect to allegations made that CWM/Trafalgar were unlicensed or did not hold the correct licences, MPM replied that Trafalgar was licensed as an insurance intermediary and consultant, as well as an investment intermediary and also referred to documentation which it had provided to MFSA. MPM also submitted that Trafalgar entered into an agency agreement with CWM and that MPM no longer accepted business from CWM as from September 2017. MPM noted that CWM ceased trading on or around 29 September 2017.

11. MPM pointed out that any business introduced by CWM to it fell within the MFSA's Pension Rules for Service Providers relating to RSAs. MPM further submitted that it does not work on a commission basis and that it neither receives commissions, nor pays commissions to any third parties.

12. In those cases,[5] where the complainant indicated that when querying the initial losses with CWM, they were informed that the losses were '*paper losses*', MPM noted *inter alia* that it cannot reply with respect to any advice the complainant received from CWM.

13. In those cases,[6] where it was alleged that MPM chose to ignore the earlier warnings relating to CWM, MPM refuted such allegations and replied that

[5] Such as Case 127/2018; Case 128/2018
[6] Such as Case 103/2018

CWM's terms of business were suspended immediately when MPM identified concerns.

14. In the various cases where allegations were made regarding the forgery, scanning/photocopying of the complainants signature on the dealing instructions form,[7] MPM typically submitted that the complainants must explain what is meant and what is being alleged when stating that dealing instructions were made without their consent. It was noted that the complainants must also clarify whether it was being alleged that MPM or CWM scanned or photocopied the dealing instruction. MPM stated that the complainants must prove the allegations including that the dealing instructions were done without their knowledge/consent.

    MPM further submitted that dealing instructions are not completed by MPM and that MPM has no awareness or line of sight of what discussions and arrangements take place between the complainant and the appointed adviser, CWM, regarding dealing instructions.

    The Service Provider explained that it is MPM's duty to ensure that the signature of the complainant and/or that of the fund adviser on the dealing instruction is verified against the proof of identification provided to MPM. The Service Provider further submitted that in all cases involving the dealing instructions submitted in respect of the complainants, such verification was made by MPM.

15. In certain cases,[8] where reference was made to the complainant signing a blank form, MPM claims that it was clear that instructions to complete dealing instructions in blank came from CWM and at that point in time, MPM was not involved. MPM noted that the complainant in such cases never informed it that dealing instructions were signed in blank.

    MPM submitted that any such complainant was negligent when executing documents in blank. MPM further submitted that it does not support documentation being signed blank and would not accept any documents

[7] All the indicated captioned cases except in Case 130/2018 and Case 172/2018.
[8] Such as Case 036/2018; Case 092/2018.

of this nature, had it been aware. MPM replied that it cannot now be requested to make good for the own negligence of the complainant.

MPM noted that the blank dealing instructions enabled CWM to decide on the investments to be purchased and enabled CWM to place instructions with MPM.

The Service Provider submitted that it had no awareness that signatures were photocopied as alleged without the member's consent. MPM reiterated that it would not have accepted documents of this nature, had it been aware.

16. In those cases,[9] where the complainant alleged that MPM has not contacted him/her regarding the losses on the pension scheme or that the complainant only learnt about the losses in 2017, MPM submitted that in addition to the welcome letter which was sent to the complainant upon membership, it also sent the complainant annual member statements.

    Furthermore, MPM noted that in September and October 2017, emails were sent to members of the Scheme, to inform them of the suspension, and later termination, of business with CWM.

    In a number of cases,[10] where it was alleged by the complainant that MPM failed to communicate any concerns at any time, MPM emphasised that the complainant was however provided by MPM with annual member statements and no complaint was raised with MPM at the time.

17. In those cases,[11] where the complainants made specific claims that MPM failed in its duties such as, to oversee their pension funds or to keep them informed of the progress or failed to act with due diligence and care or to act prudently, responsibly and honestly, MPM replied that it has, at all times, fulfilled all its obligations with respect to the complainant and observed all guidelines, including investment guidelines.

[9] Such as Case 118/2018; Case 140/2018
[10] Such as Case 109/2018; Case 116/2018
[11] Such as Case 116/2018; Case 118/2018; 128/2018; 130/2018.

18. With respect to the underlying investments, MPM replied that the investments made were in line with the risk profile of the respective complainant and in line with the guidelines applicable at the time of application with MPM.

    MPM pointed out that it had controls in place to ensure that the dealing instructions received by it were signed by the respective complainant, ensuring the investment was directed by them and the Adviser appointed by the respective complainant, in line with the attitude to risk and was then reviewed against the Scheme's investment guidelines. MPM also noted that the dealing instructions were submitted by the appointed adviser, CWM, and met Momentum's Investment Guidelines.

19. As to the allegations made[12] that the capital was invested into structured notes that were only suitable for professional investors, MPM submitted that the investments made were in line with the complainant's risk profile and in line with the guidelines applicable at the time.

20. In the instances,[13] where it was alleged that the complainant's risk profile was changed in the Application Form for Membership without their knowledge MPM replied that the said application form was signed by the complainant themselves. MPM also explained that the risk profile of the complainant was also indicated in the annual member statements and no complaint was raised with MPM at any time.

21. In those cases,[14] where the complainant alleged that the investments did not reflect his or her risk profile, the Service Provider submitted that the complainant's risk profile was chosen by the complainant and its adviser. MPM also submitted that the selection of the investments is done by the member (complainant) and the Adviser, with the latter ensuring that the chosen investments comply with the member's risk profile. MPM further explained that the Retirement Scheme Administrator ('RSA') then reviews this in line with the risk profile on file to ensure that it broadly reflects the risk profile and offers diversification.

[12] Such as in Case 093/2018.
[13] For example, in Case 093/2018; Case 095/2018.
[14] Such as Case 036/2018; Case 090/2018

MPM replied[15] that the investments made were in line with the respective complainant's risk profile and were reviewed against the Scheme Investment Guidelines.

22. MPM pointed out that, it is aware that an insurance provider, Old Mutual International Ireland Limited ('OMI'), has initiated legal action against one of the structured note providers (Leonteq Securities AG) for losses incurred by the ultimate holders of the insurance policies.[16] It was noted that it is OMI, and not MPM, who was pursuing litigation against Leonteq.

23. The Service Provider also noted in some cases[17] that it charges a fixed fee for the services that it provides and that this fee does not change regardless of the underlying investment which the respective complainant was advised to invest into by CWM. It was claimed that MPM did not accordingly stand to make any gain or benefit from any particular underlying investment.

24. With respect to allegations that the complainant was not provided with the mandatory cooling off period in respect of the underlying policy,[18] MPM submitted that this was false as the investment policy documentation was sent to the complainant on time. MPM further replied that the right to cancel was clearly set out in the documents provided to the complainant, yet the complainant did not exercise such right, and neither was any complaint raised at that point in time.

25. In those cases,[19] where it was alleged by the complainant that MPM failed to communicate or explain the fees, or that the fees were high, MPM submitted that the complainant had, however, agreed to the fee structure and that documents setting out the fees were sent to the complainant/ signed by them.

[15] Such as in Case 103/2018; Case 140/2018

[16] Except for Case 092/2018, the respective member's account with the Retirement Scheme was invested into a respective insurance policy offered by an insurance provider, such as OMI or SEB, as will be considered in further detail in this decision. The respective insurance policy would in turn comprise specific underlying investments such as structured notes.

[17] Such as in Case 109/2018; Case 116/2018

[18] Such as Case 090/2018; Case 093/2018

[19] Such as Case 103/2018; Case 127/2018

26. In those cases,[20] where the complainant challenged the introduction of business by CWM to MPM, the Service Provider further submitted that any business introduced by CWM to MPM fell within the MFSA's Pension Rules for Service Providers relating to RSAs.

27. In regard to the references made[21] to compensation paid by MPM to a third party and the inference that this amounted to an admission of responsibility, the Service Provider typically stated that disclosures regarding persons who were not involved in the complaint are privileged and should be deleted from the record of the case. MPM submitted that the disclosures breach the rights, both in terms of confidentiality and data protection, of the persons with respect to whom they have been made.

    MPM replied that it will not disclose any information pertaining to any other member. It further claimed that MPM had never paid any sums or made any financial contribution towards any settlement involving ex-CWM clients and CWM/Trafalgar.

    As to claims of compensation offered to other parties, MPM also submitted[22] that it had been working hard to help those members who have suffered as a result of CWM actions and in certain circumstances, in a very limited way, has offered assistance. MPM also submitted that this was in no way an admission of liability.

28. In those cases,[23] where the complainant alleged that MPM delayed its response to their complaint, MPM explained that it required more time than anticipated to reply to the letter of complaint and that it had informed the respective complainant of the delays and provided the reasons therefor. MPM rejected any allegations that it was stalling a response so that the complainant would fail to file the complaint by a certain date. MPM submitted that the complainant would have been at liberty to file the complaint if a reasonable time would have been allowed for MPM's response.

[20] Such as Case 036/2018; Case 116/2018
[21] For example, in Case 036/2018.
[22] For example, in Case 138/2018
[23] Such as Case 092/2018; Case 116/2018; Case 118/2018.

29. The Service Provider reiterated that MPM is not licensed to and does not provide investment advice and, furthermore, it did not provide investment advice to the Complainants.

    MPM further submitted that this is clear from the application form which specifically requests the details of the Complainants' professional adviser. It was noted that the Complainants also declared on the application form that they acknowledged that the services provided by MPM did not extend to financial, legal, tax or investment advice.

    To further reinforce the point that MPM does not provide investment advice, it was submitted that an entire section of the terms and conditions of business as attached to the application form, is dedicated solely to this point, as per the section contained in the application form.

30. MPM submitted that it is not responsible for the payment of any amounts claimed by the Complainants and that it has, at all times, fulfilled all its obligations with respect to the Complainants.

    MPM further submitted that it has not committed any fraud, nor has it acted negligently. MPM reiterated that it has not breached any of its obligations in any way and submitted that the losses sustained by the Complainants are attributable to the adviser appointed by the Complainants.

    MPM pointed out that the Complainants must show that it was MPM's actions or omissions which caused the loss being alleged. MPM replied that in the absence of the Complainants proving this causal link, MPM cannot be found responsible for the Complainants claims.

Having heard the parties and seen all the documents and submissions made including the affidavits, the notes of submissions, the additional submissions made and respective attachments,

Further Considers:

Preliminary Pleas regarding the Competence of the Arbiter

The Service Provider raised the preliminary plea that the Arbiter has no competence based **both on Article 21(1)(b) and Article 21(1)(c) of Chapter 555 of the Laws of Malta** in the following cases:

Cases 070/2018, 072/2018, 105/2018, 106/2018, 108/2018, 109/2018, 116/2018, 118/2018, 127/2018, 128/2018, 130/2018, 138/2018, 140/2018, 167/2018, 171/2018, 172/2018, 184/2018, 035/2019, 036/2019, 045/2019, 050/2019 and Case 072/2019.

The Arbiter is considering these pleas as follows:

Plea relating to Article 21(1)(b) of Chapter 555 of the Laws of Malta

Article 21(1)(b) stipulates that:

'An Arbiter shall have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider which occurred on or after the first of May 2004:

Provided that a complaint about conduct which occurred before the entry into force of this Act shall be made by not later than two years from the date when this paragraph comes into force.'

Firstly, the Arbiter notes that in a number of cases[24] the Complainants stated that MPM was stalling the submission of documents so that they would miss the deadline for complaints. It was stated that it took around four months for the Service Provider to send them a reply to their formal complaint and required documents. The Arbiter noted similar lengthy delays in much of the cases considered in this decision.

The only reason that was typically given by MPM for delays in submitting a reply was that it required more time than anticipated in order to send the reply/ documents. MPM also typically stated that such complainants should have submitted the complaint just the same, even without the required documents.

The Arbiter does not see a valid reason why the Service Provider took so long to send a reply and requested documents, even if it had to deal with various

[24] Such as *inter alia* Case 116/2018 and Case 127/2018.

complaints around the same time. It is considered that the Service Provider has not provided a valid reason for such procrastination, even more so, when the Arbiter notes the Complainants were receiving similar general replies to their formal complaint from the Service Provider.

The Arbiter deems it as very unprofessional for a service provider to make all in its powers to hinder a complaint against it, procrastinate and then raise the plea of lack of competence on the pretext that the action is '*time-barred'*. It is a long accepted legal principle that no one can rest on his own bad faith.

As to Article 21(1)(b), it is noted that the said article stipulates that a complaint related to the '*conduct*' of the financial service provider which occurred before the entry into force of this Act shall be made not later than two years from the date when this paragraph comes into force. This paragraph came into force on the 18 April 2016.

The law does not refer to the date when a transaction takes place but refers to the date when the alleged misconduct took place.

Consequently, the Arbiter has to determine whether the conduct complained of took place before the 18 April 2016 or after, in accordance with the facts and circumstances of each case.

In the case of a financial investment, the conduct of the service provider cannot be determined from the date when the transaction took place and, it is for this reason that the legislator departed from that date and laid the emphasis on the date when the conduct took place.

In these cases, the conduct complained of involves the conduct of the Service Provider **as trustee and retirement scheme administrator of the Scheme**, which role MPM occupied since the complainants became members of the Scheme and **continued to occupy beyond the coming into force of Chapter 555 of the Laws of Malta.**

Even if for argument's sake only, the Arbiter had to limit himself to the question of structured notes, (which is not the case because the complainants raised other issues and the Service Provider had other obligations apart from the oversight of the portfolio as explained later in this decision), the Service Provider did not prove in these particular cases that investments in structured

notes no longer formed part of the portfolio **after** the coming into force of Chapter 555 of the Laws of Malta. The onus of proof for such evidence rests with the Service Provider.[25] The Arbiter also makes reference to the comments made further below relating to the maturity of the structured notes.

It is also noted that the complaints in question involves the conduct of the Service Provider during the period in which CWM was permitted by MPM to act as the adviser of the complainants. The Service Provider itself declares in its reply that it no longer accepted business from CWM **as from September 2017**. CWM was, therefore, still accepted by the Service Provider and acting as the investment adviser to the complainants after the coming into force of Chapter 555 of the Laws of Malta. It has emerged that CWM was only replaced in September 2017 when MPM no longer accepted business from CWM. The responsibility of MPM in this regard is explained later on in this decision.

The Arbiter considers that the actions related to the Retirement Scheme complained about cannot accordingly be considered to have occurred before 18 April 2016 and therefore the plea as based on Article 21(1)(b) cannot be upheld.

Article 21(1)(c)

In the same cases, the Service Provider alternatively also raises the plea that Article 21(1)(c) of Chapter 555 should apply.

Article 21(1)(c) stipulates:

'An Arbiter shall also have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider occurring after the coming into force of this Act, if a complaint is registered in writing with the financial services provider not later than two years from the day on which the complainant first had knowledge of the matters complained of.'

[25] Furthermore, the Arbiter notes that in various cases, such as in Cases 036/2018, 040/2018, 068/2018, 072/2018, 103/2018, 108/2018, 109/2018, 128/2018, 130/2018, 138/2018, 140/2018, 167/2018, 172/2018, 184/2018, 034/2019, 035/2019, 036/2019 and Case 045/2019 there is actually clear evidence that structured notes still formed part of the portfolio after 18 April 2016.

In that case, the Complainants had two years to complain to the Service Provider '*from the day on which the complainant first had knowledge of the matters complained of'*.

The fact that the Complainants were sent an Annual Member Statement, as stated by the Service Provider in its notes of submissions, could not be considered as enabling the Complainants to have knowledge about the matters complained of. This taking into consideration a number of factors including that the said Annual Member Statement was a highly generic report which only listed the underlying life assurance policy.[26] The Annual Member Statement issued to Complainants by MPM included no details of the specific underlying investments held within the respective policy/account, which investments contributed to the losses and are being disputed by the Complainants. Hence, the Complainants were not in a position to know, from the Annual Member Statement they respectively received, what investment transactions were actually being carried out within their respective portfolio of investments.

It is also noted that the Annual Member Statement sent to the Complainants by the Service Provider had even a disclaimer highlighting that certain underlying investments may show a value reflecting an early encashment value or potentially a zero value prior to maturity and that such value did not reflect the true performance of the underlying assets.

The disclaimer read as follows:

'*Investment values are provided to Momentum Pensions Malta Limited by Investment Platforms who are responsible for the accuracy of this information. Every effort has been made to ensure that this statement is correct but please accept this statement on this understanding.*

Certain underlying assets with the Investment may show a value that reflects an early encashment value or potentially a zero value prior to maturity date. This will not reflect the true current performance of such underlying assets.'

[26] In case 092/2018 the Annual Member Statement only listed an underlying account held with another third party.

Such a disclaimer did not reveal much to the Complainants about the actual state of the investments and the whole scenario could not have reasonably enabled the complainants to have knowledge about the matters being complained of.

Moreover, the Arbiter, makes reference to case number 137/2018 against *Momentum Pensions Malta Ltd,* whereby it results that the Service Provider itself declared in July 2015, in reply to a member's concern regarding losses, that:

'…. *whilst we, as Trustees, will review and assess any losses,* ***these can only be on the maturity of the note,***[27]*as any valuations can and will be distorted ahead of the expiry'.*[28]

The Service Provider did not prove the date of maturity of the structured notes comprising the respective portfolio of the Complainants in question. The Arbiter also refers to the comments already made above with respect to structured notes forming part of the portfolio after the coming into force of Chapter 555.

The Arbiter has also discovered from case number 127/2018 against MPM, that the Service Provider sent communication to all members of the Scheme with respect to the position with CWM.[29] In this regard, in September 2017, members were notified by MPM about the suspension of the terms of business that MPM had with CWM. Later, in October 2017, MPM also notified the members of the Scheme about the full withdrawal of such terms of business with CWM.

The Complainants in the cases mentioned made a formal complaint with the Service Provider between the period November 2017 and mid-April 2018[30] and in any case within the two-year period established by Art. 21(1)(c) of Chapter 555.

[27] Emphasis of the Arbiter
[28] Case Number 137/2018 (*a fol.* 7 of the file), decided today
[29] Case Number 127/2018 (*a fol.* 53 of the file), decided today
[30] With the exception of Case 034/2019 and Case 072/2019 where the complaint with the Service Provider was indicated as having been done on 25 July 2018 and 7 July 2019 respectively, which in any case is considered as not being later than two years from the day on which the complainant first has knowledge of the matters complained of.

Therefore, the Service Provider did not prove that the Complainants in the said cases raised the complaint '*later than two years from the day on which the complainant first had knowledge of the matters complained of*'.

It is also noted that in the majority of the cases reviewed not even two years had passed from the coming into force of Chapter 555 of the Laws of Malta and the date when the formal complaint was made by the Complainants with the Service Provider.[31]

What has been stated above applies also to cases 036/2018, 040/2018, 043/2018, 052/2018, 068/2018, 080/2018, 081/2018, 090/2018, 091/2018, 092/2018, 093/2018, 095/2018, 102/2018, 103/2018 and 104/2018 where the plea as to the competence of the Arbiter was raised only in terms of Article 21(1)(c).

For the above-stated reasons, this plea is also being rejected and the Arbiter declares that he has the competence to deal with these complaints.

The preliminary plea regarding the request to expunge documents

With respect to case numbers 028/2018, 036/2018, 040/2018, 043/218, 081/2018, 092/2018, 102/2018, 103/2018, 184/2018, 109/2018 and 140/2018, MPM requested the Arbiter to expunge from the record of the proceedings certain documentation filed in 2019 and not take cognisance of any new allegations raised by the complainants against Momentum as it was *inter alia* submitted that the Complainants cannot change the basis of their complaint.

The Arbiter accepts the submission that no new allegations could be raised by the Complainants and is only considering the complaint as originally filed.

Other preliminary plea – Case number 070/2018 and 103/2018

With respect to case number 070/2018 and case 103/2018, MPM noted that although the complaint has been filed jointly by the spouses only one of the spouses was, however, a member of the Scheme.

[31] *Ibid.*

In case 070/2018 it is only the male complainant who is a registered member of the Scheme. In case 103/2018, it is only the female complainant who is a registered member of the Scheme.

The Arbiter accepts this plea.

The Merits of the Case

The Arbiter will decide the complaints by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.[32]

The Arbiter is considering all pleas raised by the Service Provider relating to the merits of the case together to avoid repetition and to expedite the decision as he is obliged to do in terms of Chapter 555[33] which stipulates that he should deal with the complaints in '*an economical and expeditious manner'*.

The Complainants

The Complainants are all of British nationality and either resided in Spain,[34] France,[35] Turkey,[36] Portugal[37] or UAE[38] at the time of application as per the details contained in their respective *Application for Membership of the Momentum Malta Retirement Trust* ('the Application Form for Membership').

It was not proven during the proceedings of the cases in question that any of the Complainants were professional investors. Accordingly, the Complainants in the captioned cases can all be treated as retail clients.

[32] Cap. 555, Art. 19(3)(b)
[33] Art. 19(3)(d)
[34] Case 036/2018; Case 040/2018; Case 043/2018; Case 052/2018; Case 068/2018; Case 070/2018; Case 092/2018; Case 102/2018; Case 106/2018; Case 116/2018; Case 130/2018; Case 138/2018; Case 140/2018; Case 167/2018; Case 172/2018; Case 035/2019; Case 036/2019, 050/2019 and Case 072/2019
[35] Case 081/2018; Case 090/2018; Case 091/2018; Case 093/2018; Case 095/2018; Case 103/2018; Case 104/2018; Case 105/2018; Case 108/2018; Case 109/2018; Case 127/2018; Case 128/2018; Case 184/2018; Case 045/2019.
[36] Case 028/2018, Case 072/2018, Case 080/2018 and Case 118/2018
[37] Case 034/2019
[38] Case 171/2018

The Complainants were accepted by MPM as members of the Retirement Scheme respectively:

- in the year 2012 for Case 105/2018 (in respect of the male complainant only);

- in the year 2013 for Case 040/2018, 043/2018, 052/2018, 068/2018, 095/2018, 104/2018, 106/2018, 108/2018, 116/2018, 167/2018, 045/2019 and Case 050/2019;

- in the year 2014 for Cases 036/2018, 072/2018, 081/2018, 090/2018, 091/2018, 092/2018, 093/2018, 102/2018, 103/2018, 105/2018 (in respect of the female complainant only), 118/2018, 127/2018, 128/2018, 130/2018, 138/2018, 140/2018, 171/2018, 172/2018, 184/2018 and Case 072/2019; and

- in the year 2015 for Cases 028/2018, 070/2018, 080/2018, 109/2018, 034/2019, 035/2019 and Case 036/2019.

The Service Provider

The Retirement Scheme was established by Momentum Pensions Malta Limited ('MPM'). MPM is licensed by the MFSA as a Retirement Scheme Administrator[39] and acts as the Retirement Scheme Administrator and Trustee of the Scheme.[40]

The Legal Framework

The Retirement Scheme and MPM are subject to specific financial services legislation and regulations issued in Malta, including conditions or pension rules issued by the MFSA in terms of the regulatory framework applicable for personal retirement schemes.

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was

[39] *https://www.mfsa.mt/financial-services-register/result/?id=3453*
[40] Role of the Trustee, pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).

repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta) ('RPA'). The RPA was published in August 2011 and came into force on the 1 January 2015.[41]

There were transitional provisions in respect of those persons who, upon the coming into force of the RPA, were registered under the SFA. The Retirement Pensions (Transitional Provisions) Regulations, 2015 provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

In terms of Regulation 3 of the said Transitional Provisions Regulations, such schemes or persons continued to be governed by the provisions of the SFA until such time that these were granted authorisation by MFSA under the RPA.

As confirmed by the Service Provider, registration under the RPA was granted to the Retirement Scheme and the Service Provider on 1 January 2016 and hence the framework under the RPA became applicable as from such date.[42]

Despite not being much mentioned by MPM in its submissions, the Trusts and Trustees Act (Chapter 331 of the Laws of Malta), ('TTA') is also much relevant and applicable to the Service Provider, as per Article 1(2) and Article 43(6)(c) of the TTA, in light of MPM's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme.

Indeed, Article 1(2) of the TTA provides that:

'*The provisions of this Act, except as otherwise provided in this Act, shall apply to all trustees, whether such trustees are authorised, or are not required to obtain authorisation in terms of article 43 and article 43A*',

with Article 43(6)(c) in turn providing that:

'*A person licensed in terms of the Retirement Pensions Act to act as a Retirement Scheme Administrator acting as a trustee to retirement schemes*

[41] *Retirement Pensions Act, Cap. 514/Circular letter issued by the MFSA - https://www.mfsa.com.mt/firms/regulation/pensions/pension-rules-applicable-as-from-1-january-2015/*

[42] As per pg. 1 of the affidavit of Stewart Davies and the Cover Page of MPM's Registration Certificate issued by MFSA dated 1 January 2016 attached to his affidavit.

shall not require further authorisation in terms of this Act provided that such trustee services are limited to retirement schemes …'.

Particularities of the Case

The Retirement Scheme in respect of which the Complaint is being made

The Momentum Malta Retirement Trust ('the Retirement Scheme' or 'the Scheme') is a trust domiciled in Malta. It was granted a registration by the MFSA[43] as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011 [44] and under the Retirement Pensions Act in January 2016.[45]

As detailed in the Scheme Particulars dated May 2018 presented by MPM during the proceedings of this case, the Scheme '*was established as a perpetual trust by trust deed under the terms of the Trusts and Trustees Act (Cap.331) on the 23 March 2011*'[46] and is '*an approved Personal Retirement Scheme under the Retirement Pensions Act 2011*'.[47]

The Scheme Particulars specify that:

'*The purpose of the Scheme is to provide retirement benefits in the form of a pension income or other benefits that are payable to persons who are resident both within and outside Malta. These benefits are payable after or upon retirement, permanent invalidity or death*'.[48]

The case in question involves a member-directed personal retirement scheme where the respective Member was allowed to appoint an investment adviser to advise him/her respectively on the choice of investments.

The assets held in each Complainants' respective account with the Retirement Scheme were generally used to acquire a whole of life insurance policy for each complainant.

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[43] *https://www.mfsa.com.mt/financial-services-register/result/?id=3454*
[44] Registration Certificate dated 28 April 2011 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit).
[45] Registration Certificate dated 1 January 2016 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit).
[46] Important Information section, Pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).
[47] Regulatory Status, Pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).
[48] *Ibid.*

In Cases 036/2018, 040/2018, 043/2018, 052/2018, 068/2018, 070/2018, 081/2018, 090/2018, 091/2018, 093/2018, 095/2018, 102/2018, 103/2018, 104/2018, 105/2018 (in respect of the female complainant only), 108/2018, 109/2018, 116/2018, 128/2018, 130/2018, 167/2018, 172/2018, 184/2018, 034/2019, 035/2019, 036/2019, 045/2019, 050/2019 and Case 072/2019, the life assurance policy acquired respectively for each complainant was called the European Executive Investment Bond issued by Skandia International[49]/Old Mutual International. In Case 028/2018, 072/2018, 080/2018, and 118/2018, the life assurance policy issued by Skandia International/Old Mutual International was called the Executive Investment Bond.

In Case 106/2018, 127/2018, 138/2018, 140/2018 and Case 171/2018, the life assurance policy acquired respectively for each complainant was called the SEB Asset Management Bond issued by SEB Life International.

In Case 105/2018, a whole of life policy issued by Generali International Limited was acquired in respect of the male complainant only.

In Case 092/2018, the Scheme opened an underlying QROPS account in respect of the complainant with Capital Platforms Pte Ltd, this being an entity based in Malaysia which provided '*bespoke investment services*'.[50] For the avoidance of doubt, for Case 092/2018 only, any reference throughout this decision to '*the policy*' should thus be construed to refer to the said QROPS account, unless indicated otherwise.

The premium in each respective policy (or in the QROPS account in Case 092/2018) was in turn invested in a portfolio of investment instruments under the direction of the Investment Adviser and as processed and accepted by MPM. The underlying investments in the respective portfolio comprised substantial investments in structured notes as indicated in the table of

[49] Skandia International eventually rebranded to Old Mutual International - *https://www.oldmutualwealth.co.uk/Media-Centre/2014-press-releases/december-20141/skandia-international-rebrands-to-old-mutual-international/*

[50] Case 092/2018 - *A fol.* 82-89

investments forming part of the '*Investor Profile*' presented for each Complainant by the Service Provider during the proceedings of the case.[51]

The '*Investor Profile'* presented by the Service Provider for each Complainant also included a table which *inter alia* typically provided a '*current valuation'* for the respective account.

For all the Complainants, MPM indicated a loss (which loss excluded fees). The loss experienced by the complainant is thus higher when taking into account the fees incurred and paid within the Scheme's structure.

It is to be noted that the Service Provider does not explain whether the respective loss indicated in the '*current valuation*' for each Complainant relates to realised or paper losses or both.

Investment Adviser

Continental Wealth Management ('CWM') was the investment adviser appointed by the Complainants.[52] The role of CWM was to advise the respective Complainant regarding the assets held within the Retirement Scheme.

It is noted that in the notices issued to members of the Scheme in September and October 2017, MPM described CWM as '*an authorised representative/agent of Trafalgar International GMBH*', where CWM was Trafalgar's '*authorised representative in Spain and France*'.

In its reply, MPM explained *inter alia* that CWM:

'*is a company registered in Spain. Before it ceased to trade, CWM acted as adviser and provided financial advice to investors. CWM was authorised to trade in Spain and in France by Trafalgar International GmbH*'.[53]

In its submissions, it was further explained by MPM that:

[51] The '*Investor Profile'* is attached to the Additional Submissions document presented by the Service Provider for each respective complainant.
[52] As per pg. 1/2 of MPM's respective reply before the Arbiter for Financial Services.
[53] Pg. 1 of MPM's respective reply to the OAFS.

'*CWM was appointed agent of Trafalgar International GmbH ('Trafalgar') and was operating under Trafalgar International GmbH licenses*'[54] and that Trafalgar '*is authorised and regulated in Germany by the Deutsche Industrie Handelskammer (IHK) Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53'*.[55]

Underlying Investments

The investments respectively undertaken within the life assurance policy of each Complainant (*or in Case 092/2018, the account created with Capital Platforms Pte Ltd*) were summarised in the table of investment transactions included as part of the '*Investor Profile*' information sheet provided by the Service Provider in respect of each Complainant.[56]

The extent of investments in structured notes, indicated as '*SN*' in the column titled '*Asset Type*' in the said table of investment transactions, was substantial as can be seen in the respective table.

The said table indicates that the respective portfolio of investments for each Complainant involved substantial investments in structured notes with the respective portfolio typically comprising at times solely, or predominantly, of structured notes during the tenure of CWM as investment adviser.

Further Considerations

Responsibilities of the Service Provider

MPM is subject to the duties, functions and responsibilities applicable as a Retirement Scheme Administrator and Trustee of the Scheme.

Obligations under the SFA, RPA and directives rules issued thereunder

As indicated in the MFSA's Registration Certificate dated 28 April 2011, issued to MPM under the SFA, MPM was required, in the capacity of Retirement Scheme Administrator, '*to perform all duties as stipulated by articles 17 and 19*

[54] Para. 39, Section E titled *'CWM and Trafalgar International GmbH'* of the affidavit of Stewart Davies.
[55] *Ibid.*
[56] Attachment to the '*Additional submissions*' made by MPM in respect of each Complainant.

of the Special Funds (Regulation) Act, 2002 … in connection with the ordinary or day-to-day operations of a Retirement Scheme registered under the [SFA]'.

The obligations of MPM as a Retirement Scheme Administrator under the SFA are outlined in the Act itself and the various conditions stipulated in the original Registration Certificate which *inter alia* also referred to various Standard Operational Conditions (such as those set out in Sections B.2, B.5, B.7 of Part B and Part C) of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act*, *2002'* ('the Directives')

In terms of the said Registration Certificate issued under the SFA, MPM was also required to assume and carry out, on behalf of the Scheme, any functions and obligations applicable to the Scheme under the SFA, the regulations and the Directives issued thereunder.

Following the repeal of the SFA and issue of the Registration Certificate dated 1 January 2016 under the RPA, MPM was subject to the provisions relating to the services of a retirement scheme administrator in connection with the ordinary or day-to-day operations of a Retirement Scheme registered under the RPA.

As a Retirement Scheme Administrator, MPM was subject to the conditions outlined in the '*Pension Rules for Service Providers issued under the Retirement Pensions Act*' ('the Pension Rules for Service Providers') and the '*Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act*' ('the Pension Rules for Personal Retirement Schemes').

In terms of the said Registration Certificate issued under the RPA, MPM was also required to assume and carry out, on behalf of the Scheme, any functions and obligations applicable to the Scheme under the RPA, the regulations and the Pension Rules issued thereunder.

One key duty of the Retirement Scheme Administrator emerging from the primary legislation itself is the duty to *'act in the best interests of the scheme'* as outlined in Article 19(2) of the SFA and Article 13(1) of the RPA.

From the various general conduct of business rules/standard licence conditions applicable to MPM in its role as Retirement Scheme Administrator under the

SFA/RPA regime respectively, it is pertinent to note the following general principles:[57]

a) Rule 2.6.2 of Part B.2.6 titled '*General Conduct of Business Rules applicable to the Scheme Administrator*' of the Directives issued under the SFA, which applied to MPM as a Scheme Administrator under the SFA, provided that '*The Scheme Administrator* ***shall act with due skill, care and diligence – in the best interests of the Beneficiaries*** …'.

   The same principle continued to apply under the rules issued under the RPA. Rule 4.1.4, Part B.4.1 titled '*Conduct of Business Rules*' of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the RPA, and which applied to MPM as a Scheme Administrator under the RPA, provided that '*The Service Provider* ***shall act with due skill, care and diligence*** …'.

b) Rule 2.7.1 of Part B.2.7 titled '*Conduct of Business Rules related to the Scheme's Assets*', of the Directives issued under the SFA, which applied to MPM as a Scheme Administrator under the SFA, provided that:

   '***The Scheme Administrator shall arrange for the Scheme assets to be invested in a prudent manner and in the best interest of Beneficiaries*** …'.

   The same principle continued to apply under the rules issued under the RPA. Standard Condition 3.1.2, of Part B.3 titled '*Conditions relating to the investments of the Scheme*' of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA, provided that:

   '***The Scheme's assets shall be invested in a prudent manner and in the best interest of Members and Beneficiaries*** *and also in accordance with the investment rules laid out in its Scheme Particulars and otherwise in the Constitutional Document and Scheme Document*';

c) Rule 2.6.4 of Part B.2.6 titled '*General Conduct of Business Rules applicable to the Scheme Administrator*' of the Directives issued under the SFA, which applied to MPM as a Scheme Administrator under the SFA provided that:

[57] Emphasis added by the Arbiter.

'*The Scheme Administrator shall organise and control its affairs in a responsible manner and* ***shall have adequate operational, administrative*** *and financial procedures* ***and controls in respect of its own business and the Scheme*** *to ensure compliance with regulatory conditions and to enable it to be effectively prepared to manage, reduce and mitigate the risks to which it is exposed …'.*

The same principle continued to apply under the rules issued under the RPA. Standard Condition 4.1.7, Part B.4.1 titled '*Conduct of Business Rules*' of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the RPA, provided that:

'*The Service Provider shall organise and control its affairs in a responsible manner and* ***shall have adequate operational, administrative*** *and financial procedures* ***and controls in respect of its own business and the Scheme*** *or Retirement Fund, as applicable, to ensure compliance with regulatory conditions and to enable it to be effectively prepared to manage, reduce and mitigate the risks to which it is exposed*.'

Standard Condition 1.2.2, Part B.1.2 titled '*Operation of the Scheme*, of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA, also required that:

'***The Scheme shall organise and control its affairs in a responsible manner and shall have adequate operational, administrative*** *and financial procedures* ***and controls to ensure compliance with all regulatory requirements****'*.

Trustee and Fiduciary obligations

As highlighted in the section titled '*The Legal Framework*' above, the Trusts and Trustees Act ('TTA'), Chapter 331 of the Laws of Malta is also relevant for MPM considering its capacity as Trustee of the Scheme. This is an important aspect on which not much emphasis on, and reference to, has been made by the Service Provider in its submissions.

Article 21 (1) of the TTA which deals with the '*Duties of trustees*', *inter alia* stipulates that the trustee should act as a ***bonus paterfamilias.***

The said article provides that:

'(1) ***Trustees shall in the execution of their duties and the exercise of their powers and discretions act <u>with the prudence, diligence and attention of a bonus paterfamilias</u>,*** *act in utmost good faith and avoid any conflict of interest'.*

It is also to be noted that Article 21 (2)(a) of the TTA, further specifies that:

'Subject to the provisions of this Act, trustees shall carry out and administer the trust according to its terms; and, subject as aforesaid, the trustees shall ensure that the trust property is vested in them or is under their control and shall, so far as reasonable and subject to the terms of the trust, safeguard the trust property from loss or damage *…'.*

In its role as Trustee, MPM was accordingly duty bound to administer the Scheme and its assets to high standards of diligence and accountability.

The trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property '*as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality*'.[58]

As has been authoritatively stated:

'*Trustees have many duties relating to the property vested in them. These can be summarized as follows:* ***to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust'***.[59]

The fiduciary and trustee obligations were also highlighted by MFSA in a recent publication where it was stated that:

'In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries*. It is to be noted that by virtue of Article 1124A of*

[58]Editor Max Ganado, '*An Introduction to Maltese Financial Services Law*', Allied Publications 2009, p. 174
[59] *Op. Cit*., p. 178

the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract, quasi-contract or trusts. In particular, ***the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus pater familias in the performance of his obligations****'*.[60]

Although this Consultation Document was published in 2017, MFSA was basically outlining principles established both in the TTA and the Civil Code which had already been in force prior to 2017.

The above are considered to be crucial aspects which should have guided MPM in its actions and which shall accordingly be considered in this decision.

Other relevant aspects

One other important duty relevant to the case in question relates to **the oversight and monitoring function of the Service Provider in respect of the Scheme including with respect to investments**. As acknowledged by the Service Provider whilst MPM's duties did not involve the provision of investment advice, however, MPM did '*… **retain the power to ultimately decide whether to proceed with an investment or otherwise***'.[61]

Once an investment decision is taken by the member and his investment adviser and such decision is communicated to the retirement scheme administrator, MPM explained that as part of its duties:

'The RSA will then ensure that the proposed trade on the dealing instruction, when considered in the context of the entire portfolio, ensures a suitable level of diversification, is in line with the member's attitude to risk and in line with the investment guidelines (applicable at the time the trade is placed) …'.[62]

MPM had accordingly the final say prior to the placement of a dealing instruction, in that, if MPM was satisfied that the level of diversification is suitable and in order, and the member's portfolio as a whole is in line with his

[60] Page 9 – Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], dated 6 December 2017.
[61] Para. 17, page 5 of the affidavit of Stewart Davies
[62] Para. 31, Page 8 of the affidavit of Stewart Davies

attitude to risk and investment guidelines '*the dealing instruction will be placed with the insurance company and the trade will be executed.* ***If the RSA is not so satisfied, then the trade will not be proceeded with***'.[63]

This, in essence, reflected the rationale behind the statement reading:

'*I accept that I or my designated professional adviser may suggest investment preferences to be considered, however,* ***the Retirement Scheme administrator will retain full power and discretion for all decisions relating to the purchase, retention and sale of the investments*** *within my Momentum Pensions Retirement Fund*',

which featured in the '*Declarations*' section of the *Application Form for Membership* respectively signed by the Complainants.

The MFSA regarded the oversight function of the Retirement Scheme Administrator as an important obligation where it emphasised, in recent years, the said role. The MFSA explained that it:

'… is of the view that as specified in SLC 1.3.1 of Part B.1 (Pension Rules for Retirement Scheme Administrators) of the Pension Rules for Service Providers, the RSA, in carrying out his functions, shall act in the best interests of the Scheme members and beneficiaries. The MFSA expects the RSA to be diligent and to take into account his fiduciary role towards the members and beneficiaries, at all times, irrespective of the form in which the Scheme is established. The RSA is expected to approve transactions and to ensure that these are in line with the investment restrictions and the risk profile of the member in relation to his individual member account within the Scheme'.[64]

The MFSA has also highlighted the need for the retirement scheme administrator to query and probe the actions of a regulated investment adviser stating that *'the MFSA also remains of the view that the RSA is to be considered responsible to verify and monitor that investments in the individual member*

[63] Para. 33, Page 9 of the affidavit of Stewart Davies. Para. 17 of Page 5 of the said affidavit also refers.
[64] Pg. 7 of the MFSA's Consultation Document dated 16 November 2018 titled '*Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions act*' (MFSA Ref. 15/2018) - https://www.mfsa.com.mt/publications/policy-and-guidelines/consultation-documents-archive/.

account are diversified, and the RSA is not to merely accept the proposed investments, but it should acquire information and assess such investments'. [65]

Despite that the above-quoted MFSA statements were made in 2018, an oversight function applied during the period relating to the case in question as explained earlier on.

As far back as 2013, MPM's Investment Guidelines indeed also provided that:

'***The Trustee need to ensure that the member's funds are invested in a prudent manner and in the best interests of the beneficiaries. The key principle is to ensure that there is a suitable level of diversification*** *…*'[66],

whilst para. 3.1 of the section titled '*Terms and Conditions'* of the Application Form for Membership into the Scheme also provided *inter alia* that:

'… ***in its role as Retirement Scheme Administrator [MPM] will exercise judgement as to the merits or suitability of any transaction*** *…*'.

It is also to be noted that even in older forms, such as the Application for Membership used by MPM in the year 2012, the said form included a provision that '*Momentum Pensions Malta Ltd are professional Retirement Scheme Administrators.*

We will consider your Investment preferences and ensure your retirement fund is managed in line with the relevant regulatory requirements of HMRC and the Malta Financial Services Authority. The Retirement Scheme Administrator will retain ultimate power and discretion with regards to the investment decisions.

The Retirement Scheme Administrator binds himself to review the performance of the Scheme using generally accepted local and international benchmarks prevalent at the time and fully in line with the requirements of SOC B 1.3.2 iii of the Directive issued under the Act.

[65] Pg. 9 of MFSA's Consultation Document dated 16 November 2018 titled *'Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act' (MFSA Ref. 15/2018).*

[66] Investment Guidelines titled January 2013, attached to the affidavit of Stewart Davies. The same statement is also included in page 9 of the Scheme Particulars of May 2018 (also attached to the same affidavit).

The Retirement Scheme Administrator, furthermore, shall ensure that any investments made are within the diversification parameters established under the prevailing legislation *whilst at the same time, having due regard to any Member's 'letter of wishes'.*

However, it is clear that the Retirement Scheme Administrator will use his absolute discretion at all times and will place any investments in the best interests of the Members and the Beneficiaries *as explained in Clause 13.1 of the Trust Deed'.*[67]

Other Observations and Conclusions

Allegations relating to the signature on the dealing instructions

In Cases 028/2018, 036/2018, 040/2018, 043/2018, 052/2018, 068/2018, 070/2018, 080/2018, 081/2018, 090/2018, 091/2018, 092/2018, 095/2018, 102/2018, 103/2018, 104/2018, 105/2018, 106/2018, 108/2018, 109/2018, 116/2018, 118/2018, 127/2018, 128/2018, 138/2018, 140/2018, 184/2018, 034/2019, 035/2019, 036/2019, 045/2019 and Case 050/2019, allegations were made that MPM accepted dealing instructions for investments which were not authorised by the complainants where it was, in essence, claimed that the signatures on the dealing investment instruction forms were forged, scanned or photocopied.

This is a serious allegation which had to be specifically proven by specific facts and, in the case of allegations of false or copied signatures, the Arbiter must be comforted in such a way as to accept the allegation. However, the complainants making this allegation did not provide enough evidence to the Arbiter to accept their allegation.

Nonetheless, the Arbiter would like to comment on the practice adopted by the Service Provider.

Communications relating to dealing instructions seem to have only occurred between MPM and the investment adviser without the respective complainant

[67] Section titled '*Investment Policy Statement*' in the Application Form for Membership used by MPM in 2012 – Appendix 3 to MPM's Reply in Case 105/2018

being in copy or made promptly and adequately aware of the investment instructions given by the investment adviser and executed by MPM. It has indeed not emerged during the proceedings of the case that complainants were being adequately and promptly notified by MPM about material developments relating to their portfolio of investments within the Scheme as would reasonably be expected in respect of a consumer of financial services.

Not even the statements issued annually by MPM to the respective members of the Scheme provided details of the underlying investments. The Annual Member Statements were indeed generic in nature and only mentioned the underlying policy. Such statements did not include details of the investment transactions undertaken over the respective period nor details about the composition of the portfolio of investments as at the year end.

In its capacity as Trustee and Scheme Administrator, MPM had full details of the investment transactions undertaken and the composition of the portfolio but yet did not report about such and neither has it proven that it ensured that the respective members had received such information.

The procedures used and methods of communications adopted by MPM, indeed enabled a possible situation such as that claimed by various complainants. The serious allegations about the false signatures on dealing instructions, could have been easily avoided and/or at least addressed in a timely manner with simple measures and safeguards adopted by the trustee and scheme administrator.

In the context of member-directed schemes such measures could have involved, for example, accepting communications either from the complainant or with the complainant being in copy in certain communications involving dealing instructions/confirmation of execution; and/or the respective member being adequately and promptly informed by MPM of the purchases and redemptions being made within the portfolio of investments.

This highlights the apparent lack of adequate controls and administrative procedures implemented by MPM which reasonably put into question MPM's adherence with the requirements to have adequate operational, administrative and controls in place in respect of its business and that of the

scheme as it was required to do in terms of Rule 2.6.4 of Part B.2.6 of the Directives under the SFA and Standard Condition 4.1.7, Part B.4.1 of the Pension Rules for Service Providers issued under the RPA as well as Standard Condition 1.2.2, Part B.1.2 of the Pension Rules for Personal Retirement Schemes issued in terms of the RPA during the respective periods when such rules applied as outlined above.

The lack of adequate controls and administrative procedures is not just an aspect that features with respect to the handling of dealing instructions and verification of consent by members of such instructions, but also on other aspects involving the ongoing activities of the Scheme Administrator. This is particularly so with respect to the controls on the verification of compliance with the Investment Guidelines and also the reporting to members amongst others as shall be considered below in this decision.

Allegations in relation to fees

In a number of cases namely, Cases 036/2018, 043/2018, 070/2018, 103/2018, 105/2018, 106/2018, 127/2018, 128/2018, 138/2018 and Case 034/2019 certain allegations were made relating to fees where, in essence, the complaint also related to fees not being disclosed, fully explained and/or being high.

The Arbiter has not found sufficient evidence to uphold this claim taking also into consideration in particular the explanations made by the Service Provider and documentation presented with respect to the Scheme and the underlying policy's charging structure.

With respect to the fees being high, the Arbiter considers that there is also insufficient evidence for him to determine whether, in the particular circumstances of the case, the contested fees were either reflective of, or on the other hand not in line with, market practice.

On the point of fees, the Arbiter would, however, like to make a general observation. The Arbiter considers that the trustee and scheme administrator of a retirement scheme, in acting in the best interests of the member as duty bound by law and rules to which it is subject to, is required to be sensitive to,

and mindful of, the implications and level of fees applicable within the whole structure of the retirement scheme and not just limit consideration to its own fees.

In its role of a *bonus paterfamilias,* the trustee of a retirement scheme is reasonably expected to ensure that the extent of fees applicable within the whole structure of a retirement scheme is reasonable, justified and adequate overall when considering the purpose of the scheme. Where there are issues or concerns these should be reasonably raised with the prospective member or member as appropriate.

Consideration would in this regard need to be given to a number of aspects including: the extent of fees vis-à-vis the size of the respective pension pot of the member; that the extent of fees are not such as to inhibit or make the attainment of the objective of the Scheme difficult to be actually reached without taking excessive risks; neither that the level of fees motivate investment in risky instruments and/or the construction of risky portfolios.

Key considerations relating to the principal alleged failures

The Arbiter will now consider the principal alleged failures. As indicated above, the following three principal alleged failures have been identified:

a) That MPM accepted business and/or allowed the appointment of CWM when this was an unlicensed investment adviser;

b) That MPM allowed an unsuitable portfolio of underlying investments to be created within the Retirement Scheme which portfolio comprised high risk structured products of a non-retail nature which was not in line with the applicable conditions relating to the portfolio composition and/or which was not in line with the complainant's risk profile;

c) That MPM provided inadequate and/or lack of information to the member of the Retirement Scheme.

General observations

On a general note, it is clear that MPM did not provide investment advice in relation to the underlying investments of the member-directed scheme.

The role of the investment adviser was the duty of other parties, such as CWM. **This would reflect on the extent of responsibility that the financial adviser and the RSA and Trustee had in this case as will be later seen in this decision.**

However, despite that the Retirement Scheme Administrator was not the entity which provided the investment advice to invest in the contested financial instruments, **MPM had, nevertheless, certain obligations to undertake in its role of Trustee and Scheme Administrator. The obligations of the trustee and retirement scheme administrator in relation to a retirement plan are important ones and could have a substantial bearing on the operations and activities of the scheme and affect directly, or indirectly, its performance**.

Consideration, thus, needs to be made as to whether MPM failed in any relevant obligations and duties, and if so, to what extent any such failures are considered to have had a bearing or otherwise on the financial performance of the Scheme and the resulting respective losses for the Complainants.

A. The appointment of the Investment Adviser

It is noted that the respective Complainant chose the appointment of CWM to provide him/her with investment advice in relation to the selection of the underlying investments and composition of the portfolio within the member-directed Scheme.

However, from its part, MPM allowed and/or accepted CWM to provide investment advice to the respective Complainant within the Scheme's structure. **MPM even had itself an introducer agreement with CWM**.

There are a number of aspects which give rise to concerns on the diligence exercised by MPM when it came to the acceptance of, and dealings with, the investment adviser as further detailed below.

Inappropriate and inadequate material issues involving the Investment Adviser

i. *Inaccurate, incorrect and unclear information relating to the adviser in MPM's Application Form for Membership*

It is considered that **MPM accepted and allowed inaccurate, incorrect and unclear or incomplete information relating to the Adviser to prevail in its own Application Form for Membership**. MPM should have been in a position to identify, raise and not accept the material deficiencies included in the respective Application Form.

If inaccurate, unclear, incorrect and/or incomplete material information was made in the Application Form for Membership on such a key party it was only appropriate and in the best interests of the complainant, and reflective of the role as Trustee as a *bonus paterfamilias*, for MPM to raise and flag such matters to the complainant and not accept such inadequacies in its form. **MPM had ultimately the prerogative whether to accept the application, the selected investment adviser and also decide with whom to enter into terms of business**.

The section titled '*Professional Adviser's Details*' in the Application Form for Membership for the respective Complainant indicated '*Continental Wealth Management'*/'*CWM'* as the company's name of the professional adviser in all the cases except for Cases 028/2018, 080/2018, 109/2018, 034/2019, 035/2019 and Case 036/2019. For the latter, the name of the adviser was indicated incorrectly as '*Continental Wealth Trust*' despite that other documents in the same cases make reference to Continental Wealth Management ('CWM').

In the same section of the Application Form, CWM was indicated as having a registered address in Spain and that it was regulated.[68]

Different answers were provided in the same section of the form in respect of who was the regulator of CWM as follows:

- In Cases 028/2018, 070/2018, 080/2018, 090/2018, 091/2018, 102/2018, 103/2018, 105/2018 in respect of the female complainant only, 109/2018, 118/2018, 171/2018, 034/2019, 035/2019 and Case 036/2019, the name of the regulator in the Application Form for Membership was indicated as '*GLOBALNET*';

[68] Except in Case 172/2018, where the field for '*Regulator*' was left empty.

- In Cases 040/2018, 043/2018, 052/2018, 068/2018, 072/2018, 081/2018, 093/2018, 104/2018, 108/2018, 116/2018, 127/2018, 128/2018, 138/2018, 140/2018, 184/2018, 045/2019, 050/2019 and Case 072/2019 the name of the regulator in the Application Form for Membership was indicated as '*ICCS*' and in case 105/2018 as '*ICCS/IAW*' in respect of the male complainant only;

- In Cases 092/2018, 095/2018, 106/2018, 130/2018 and Case 167/2018, the name of the regulator in the Application Form for Membership was indicated as '*Inter-Alliance*' or '*Inter-Alliance Worldnet*';

- In Cases 036/2018 the name of the regulator in the Application Form for Membership was indicated as '*Cyprus*'.

The Arbiter considers all the above references to the regulator as inadequate and all misleading for the following reasons:

With respect to the reference to '*Globalnet*' as the regulator of CWM, it is to be noted that MPM itself had explained that '*Global Net Limited ('Global Net'), an unregulated company, is an associate company of Trafalgar and offers administrative services to entities outside the European Union*'.[69]

Global Net could have thus not been the regulator of a professional adviser. Global Net is clearly not a regulatory authority and, being an unregulated and connected company itself, could not possibly have provided any comfort that there was some form of regulation nor that there were any adequate controls and/or supervision as one would expect in the field of regulated financial services providers.

With respect to the references to '*ICCS*' and '*Inter-Alliance*' such references were not defined or explained in the Application Form. Neither were such references ever explained or referred to during the comprehensive submissions made by the Service Provider during the proceedings of the case. It has not emerged either that ICCS and/or Inter-Alliance are, or were, a regulatory authority for investment advisers in Spain or in any other

[69] Pg. 1 – Reply by MPM to the OAFS

jurisdiction. It appears that Inter-Alliance, an abbreviation apparently for '*Inter Alliance WorldNet Insurance Agents & Advisers Ltd*' was a service provider itself in Cyprus, but clearly it was not a regulatory authority.[70] With reference to 'ICCS' it appears that this could be an acronym for the '*Cypriot Insurance Companies Control Service*'. The Cypriot Insurance Companies Control Service is involved in the insurance sector in Cyprus.[71]

No evidence, however, of any authorisation or any form of approval issued by such to CWM has been mentioned by the Service Provider and even more, neither produced by it during the proceedings of the case.

Indeed, no evidence was actually submitted by MPM of CWM being truly regulated.

Apart from all the inconsistent and different replies included in the Application Form for Membership on the 'regulator' of CWM, which is in itself telling, the references to Globalnet, ICCS or Inter-Alliance, could not have reasonably provided any comfort to MPM that any of these was a regulator of CWM and neither that there was some form of regulation and adequate controls and/or supervision on CWM equivalent to that applicable for regulated investment services providers.

ii. *Lack of clarity/convoluted information relating to the adviser in the Application Form of the Underlying Policy*

It is noted that the lack of clarity and convolution relating to the investment adviser has also prevailed in the Application Form submitted in respect of the acquisition of the underlying policy, that is, the one issued by Skandia International/Old Mutual International in Cases 028/2018, 036/2018, 040/2018, 043/2018, 052/2018, 068/2018, 070/2018, 072/2018, 080/2018, 081/2018, 090/2018, 091/2018, 093/2018, 095/2018, 102/2018, 103/2018, 104/2018, 105/2018 in respect of the female complainant only, 108/2018, 109/2018, 116/2018, 118/2018, 128/2018, 130/2018, 167/2018, 172/2018, 184/2018, 034/2019, 035/2019, 036/2019, 045/2019, 050/2019 and Case

[70] https://international-adviser.com/iaw-fined-cypriot-regulator/
[71] http://mof.gov.cy/en/directorates-units/insurance-companies-control-service

072/2019, and the policy issued by SEB Life International in Case 106/2018, 127/2018, 138/2018, 140/2018 and Case 171/2018.

MPM, as Trustee of the Scheme had clear sight of the said application and had indeed signed the application for the acquisition of the respective policy for each Complainant in its role as trustee.

In respect of those cases outlined above involving the policy issued by Skandia International/Old Mutual International, the application form of the policy provider refers to and includes the stamp of another party as financial adviser.

The first page of the said application form includes a section titled '*Financial adviser details*' and a field for '*Name of financial adviser*', with such section referring to and/or including a stamp bearing Inter-Alliance's name in Cases 036/2018, 040/2018, 043/2018, 052/2018, 068/2018, 081/2018, 090/2018, 091/2018, 095/2018, 102/2018, 103/2018, 104/2018, 105/2018 (in respect of the female complainant only), 108/2018, 116/2018, 128/2018, 130/2018, 167/2018, 172/2018, 184/2018, 045/2019 and Case 072/2019.

The two entities, both CWM and Inter-Alliance are then typically featured in the section '*Financial adviser declaration*' of the said form with the same stamp of Inter-Alliance with a PO Box in Cyprus, again featuring here in the part titled '*Financial adviser stamp*' in the same section.[72] [73]

In Cases 070/2018, 109/2018, 034/2019, 035/2019 and Case 036/2019, references to/the stamp used in the respective sections were of Trafalgar International GmbH instead. In Case 028/2018, 072/2018, 080/2018 and 118/2018, references/the stamp used in the respective sections were of GlobalNet Ltd instead.

In Case 050/2019, the name 'Continental Wealth Management' was crossed from the first page in the section titled '*Financial adviser details*' and in the field for '*Name of financial adviser*' the name of Inter-Alliance was included.

[72] In Case 093/2018, the stamp of Inter-Alliance featured in the field for '*Financial adviser stamp*' in the '*Financial adviser declaration*' section but not in the first page of the Application Form.
[73] No '*Financial adviser stamp*' in the '*Financial adviser declaration*' section was included in Case 167/2018 and Case 184/2018.

In respect of Case 106/2018 and Case 127/2018, involving the policy issued by SEB Life International ('SEB'), references to Inter-Alliance was also made as intermediary in the respective form and in Case 138/2018, not even mention of CWM was made but only reference to Inter-Alliance was included.

In Case 140/2018, the same person, Dawn Kirby, who was indicated as adviser of CWM in MPM's Application Form for Membership also features in SEB's Life International Application Form as the signatory, in the position of Managing Director of Inter-Alliance. In case 171/2018, references to Trafalgar International GmbH as intermediary was made in SEB's form.

In respect of Case 105/2018, involving the policy issued by Generali International Limited, the stamp of GlobalNet Limited also featured next to the reference to Continental Wealth Management on the first page of the application form of the insurance provider.

There was accordingly lack of clarity on the exact entity ultimately taking responsibility for the investment advice being respectively provided to the Complainants.

For the reasons explained, the information on the financial adviser is also somewhat inconsistent between that included in MPM's application form and the application form of the issuer of the underlying policy.

iii. *No proper distinctions between CWM, Inter-Alliance, GlobalNet and/or Trafalgar*

It is also unclear why the Annual Member Statement sent by MPM to the Complainants for the years ending December 2015 and 2016 indicated in the same statement '*Continental Wealth Management*' as '*Professional Adviser*' whilst at the same time indicated another party, typically '*Trafalgar International GmbH*' as the '*Investment Adviser'*. [74] [75] [76] [77]

[74] The only two cases where '*Continental Wealth Management*' was indicated both as '*Professional Adviser*' and '*Investment Adviser*' in the said Annual Member Statements was in Case 092/2018 and Case 171/2018.
[75] In Case 050/2019, the reference to '*Continental Wealth Management*' as '*Professional Adviser*' and the reference to '*Trafalgar International GmbH*' as '*Investment Adviser*' only occurred in the Annual Member Statement ending December 2015.

No indication or explanation of the distinction and differences between the two terms of '*Professional Adviser*' and '*Investment Adviser*' were either provided or emerged nor can reasonably be deduced.

Besides the lack of clarity on the entity taking responsibility for the investment advice, the lack of clear distinction and links between the indicated parties in the application forms and/or statements, it has also not emerged that Complainants were provided with clear and adequate information regarding the respective roles and responsibilities between the different mentioned entities throughout.

If CWM was acting as an appointed agent of another party, such capacity, as an agent of another firm, should have been clearly reflected in the application forms and other documentation relating to the Scheme. Relevant explanations and implications of such agency relationship should have also been duly indicated without any ambiguity.

Indeed, during the proceedings of this case MPM has not provided evidence of any agency agreement between CWM and Inter-Alliance and/or CWM and GlobalNet nor between CWM and Trafalgar.

In various replies that MPM sent directly to the respective Complainants in respect of their formal complaint, MPM typically explained that:

'Momentum in its capacity as Trustee and RSA, in exercising its duty to you ensured: The full details of the Scheme, including all parties' roles and responsibilities were clearly outlined to you in the literature provided ensuring no ambiguity,[78] including but not limited to the initial application form and T&C, the Scheme Particulars and Trust Deed and Rules'.[79]

[76] In Case 028/2018, 072/2018 and Case 080/2018 reference was made to '*Continental Wealth Management*' as '*Professional Adviser*' and to '*Globalnet Limited*' as the '*Investment Adviser*'.
[77] In Case 104/2018, this applied in the Annual Member Statement for the year ending 31 December 2016, this being the statement produced during the proceedings of this case.
[78] Emphasis added by the Arbiter.
[79] Section 3, titled '*Overview of Momentum Controls in place in exercising a duty to all members*' in MPM's reply to the complainant in relation to the complaint made in respect of the Momentum Malta Retirement Trust.

The Arbiter does not have comfort that such a duty has been truly achieved in respect of the adviser for the reasons amply explained above

iv. *No regulatory approval in respect of CWM*

During the proceedings of this case no evidence has either emerged about the regulatory status of CWM. As indicated earlier, MPM provided no details about ICCS or Inter-Alliance, and in its submissions only referred to the alleged links between CWM and Trafalgar.

MPM only provided a copy of the authorisations issued to Trafalgar International GmbH in Germany which just indicated that Trafalgar (and not CWM) held an authorisation as at 05.02.2016 as '*Investment intermediary*' and '*Insurance intermediary and insurance consultant*' from IHK Frankfurt am Main, the Chamber of Commerce and Industry in Frankfurt with the '*Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53*'.[80]

With respect to authorisations issued by IHK, the Arbiter notes certain correspondence presented by the complainants in case number 068/2018 and Case 172/2018 against MPM. The said correspondence involved replies issued by IHK in 2018 to queries made in respect of CWM.

In this regard, in an email from IHK dated 19 April 2018, IHK noted *inter alia* that it was not aware of an official affiliation between CWM and Trafalgar and that Trafalgar held the financial investment intermediation licence (34f para. 1 GewO) from June 2013 until March 2016 where the licence was '*not extendable'* and *'even back then it did not cover the activities of another legal personality*'.[81]

Similarly, in a letter dated 20 April 2018 issued by IHK it was *inter alia* noted by IHK that:

[80] Copy of authorisations issued to Trafalgar were attached to the Reply of MPM submitted before the Arbiter for Financial Services and/or specifically referred to in para. 39 Section E, titled '*CWM and Trafalgar International GmbH*' in the affidavit of Stewart Davies.
[81] Email from IHK dated 19 April 2018 – *A fol.* 166/167 of Case number 068/2018, decided today

'*Trafalgar International GmbH is a German limited company headquartered in Frankfurt am Main. The company currently holds a licence under 34d para.1 German Trade Law (German: Gewerbeordnung, GewO) (insurance intermediation). The German licence as an insurance intermediary cannot be extended to another legal personality and it does not authorize the licence holder to regulate other insurance or financial investment intermediaries.'*[82]

MPM's statement that CWM '*was operating under Trafalgar International GmbH licenses*'[83] has not been backed up by any evidence during the proceedings of this case and has actually been contradicted by communications issued by IHK as indicated above. It is accordingly clear that no comfort can be taken from the authorisation/s held by Trafalgar.

Indeed, no evidence of any authorisation held by CWM in its own name or as an agent of a licensed institution, authorising it to provide advice on investment instruments and/or advice on investments underlying an insurance policy has, ultimately been produced or emerged during the proceedings of this case.

In the absence of such, **the mere explanations provided by MPM regarding the regulatory status of CWM, including that CWM '*was authorised to trade in Spain and in France by Trafalgar International GmbH*',[84] are rather vague, inappropriate and do not provide sufficient comfort of an adequate regulatory status for CWM to undertake the investment advisory activities provided to the Complainant**.

This also taking into consideration that:

(i) Trafalgar is itself no regulatory authority but only a licensed entity. Similarly, Inter-Alliance and/or GlobalNet were no regulatory authority. Furthermore, with respect to GlobalNet, as explained by the Service Provider itself this was just '*an unregulated company*', being an associate

[82] Letter from IHK dated 20 April 2018 – *A fol.* 12/13 of Case number 172/2018, decided today
[83] Para. 39, Section E titled *'CWM and Trafalgar International GmbH'* of the affidavit of Stewart Davies.
[84] Pg. 1, Section A titled *'Introduction'*, of the Reply of MPM submitted before the Arbiter for Financial Services.

company of Trafalgar' offering '*administrative services to entities outside the European Union'*;[85]

(ii) the lack of clarity as to the regulatory status of the investment adviser included in the Application Form for Membership as well as the confusing and unclear references in the sections relating to the investment adviser in other documentation as indicated above;

(iii) legislation covering the provision of investment advisory services in relation to investment instruments, namely the Markets in Financial Instruments Directive (2004/39/EC) already applied across the European Union since November 2007.

No evidence was provided that CWM, an entity indicated as being based in Spain, held any authorisation to provide investment advisory services, in its own name or in the capacity of an agent of an investment service provider under MiFID.

Article 23(3) of the MiFID I Directive, which applied at the time, indeed provided specific requirements on the registration of tied agents.[86]

No evidence of CWM featuring in the tied agents register in any EU jurisdiction was either produced or emerged.

Neither was any evidence produced of any exemption from licence under MiFID or that CWM held an authorisation or exemption under any other applicable European legislation for the provision of the contested investment advice.

The Service Provider noted *inter alia* that '*CWM was appointed agent of Trafalgar International GmbH*'.[87]

[85] Page 1, Section A of the respective Reply filed by MPM to the OAFS.
[86] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0039&from=EN
[87] Para. 39, Section E titled '*CWM and Trafalgar International GmbH*' of the affidavit of Stewart Davies.

The nature of the agency agreement that CWM was claimed to have was not explained nor defined, and it was not indicated either in terms of which European financial services legislation such agency agreement was in force and permitted the provision of the disputed investment advice. Nor evidence of any agency agreement existing between CWM and any other party was produced during the proceedings of these cases as indicated above.

Other observations & synopsis

As explained above, although being selected by the respective Complainant, the investment adviser was however accepted, at MPM's sole discretion, to act as the Complainants' investment adviser within the Scheme's structure.

The responsibility of MPM in accepting and allowing CWM to act in the role of investment adviser takes even more significance when one takes into consideration the scenario in which CWM was accepted by MPM. As indicated above, MPM accepted CWM when it was being stated in its own application form that CWM was a regulated entity, but no evidence has transpired that this was so, as amply explained above.

MPM allowed and left uncontested incorrect, misleading and unclear key information to feature in its own Application Form for Membership of the Retirement Scheme with respect to the regulatory status of the investment adviser. In so doing, it abetted a fundamentally wrong impression and perception held by Complainants that the investment adviser they were respectively selecting was regulated when, in reality, no evidence has emerged that CWM was indeed a regulated entity.

The Service Provider argued *inter alia* in its submissions that it was not required, in terms of the rules, to require the appointment of an adviser which was regulated during the years 2013-2015 under the SFA regime and until the implementation of Part B.9 titled '*Supplementary Conditions in the case of entirely Member Directed Schemes*' of the Pension Rules for Personal Retirement Schemes issued in terms of the RPA updated in December 2018, where the latter clearly introduced the requirement for the investment adviser to be regulated.

However, the Arbiter believes that MPM in its capacity as Trustee had in any case the obligation to act with the required diligence of a *bonus paterfamilias* throughout, and was duty bound to raise with the respective Complainant, and not itself accept, material aspects relating to the investment adviser, which it should have reasonably been in a position to know that where incorrect, misleading and inappropriate. Instead it chose to allow and accept such material incorrect, misleading and inappropriate information relating to the adviser to even prevail in its own application form.

The appointment of an entity such as CWM as investment adviser meant, in practice, that there was a layer of safeguard in less for the Complainant as compared to a structure where an adequately regulated adviser is appointed. An adequately regulated financial adviser is subject to, for example, fitness and properness assessments, conduct of business requirements as well as ongoing supervision by a financial services regulatory authority. MPM, being a regulated entity itself, should have been duly and fully cognisant of this. It was only in the best interests of the Complainants for MPM to ensure that the Complainants had correct and adequate key information about the investment adviser.

Besides the issue of the regulatory status of the adviser, MPM also allowed and left uncontested important information, which was convoluted, misleading, unclear and lacking, with respect to the investment adviser, namely in relation to:

- **CWM's alleged role as agent of another party, and the respective responsibilities of CWM and its alleged principal/s;**
- **the entity actually taking responsibility for the investment advice given to the complainants, as more than one entity was at times being mentioned with respect to investment advice;**
- **the distinctions between CWM and Inter Alliance/GlobalNet/ Trafalgar.**

It is also to be noted that apart from the above, MPM had itself a business relationship with CWM, having accepted it to act as its introducer of

business. Such relationship gave rise to potential conflicts of interest, where an entity whose actions were subject to certain oversight by MPM on one hand was on the other hand channelling business to MPM.

Even in case where under the previous applicable regulatory framework, an unregulated adviser was allowed by the trustee and scheme administrator to provide investment advice to the member of a member-directed scheme, **one would, at the very least, reasonably expect the retirement scheme administrator and trustee of such a scheme to exercise even more caution and prudence in its dealings with such a party in such circumstances.**

This is even more so when the activity in question, that is, one involving the recommendations on the choice and allocation of underlying investments, has such a material bearing on the financial performance of the Scheme and the objective to provide for retirement benefits.

It would have accordingly been only reasonable to expect the trustee and retirement scheme administrator, as part of its essential and basic obligations and duties in such roles, to have an even higher level of disposition in the probing and querying of the actions of an unregulated investment adviser in order to also ensure that the interests of the member of the scheme are duly safeguarded and risks mitigated in such circumstances.

The Arbiter does not have comfort that such level of diligence and prudence has been actually exercised by MPM for the reasons already stated in this section of the decision.

B. <u>The permitted portfolio composition</u>

Investment into Structured Notes

Preliminary observations

The sale of, and investment into, structured notes is an area which has attracted various debates internationally including reviews by regulatory authorities over the years. Such debates and reviews have been occurring even way back since the time when the Retirement Scheme was granted registration in 2011.

The Arbiter considers that caution was reasonably expected to be exercised with respect to investments in, and extent of exposure to, such products since the time of the Scheme's registration. Even more so when taking into consideration the nature of the Retirement Scheme and its specific objective.

Nevertheless, the exposure to structured notes allowed within the Complainants' respective portfolio was extensive, with the respective insurance policy underlying the Scheme being at times fully or predominantly invested into such products.

A typical definition of a structured note provides that:

'*A structured note is a debt security issued by financial institutions; its return is based on equity indexes, a single equity, a basket of equities, interest rates, commodities or foreign currencies. The return on a structured note is linked to the performance of an underlying asset, group of assets or index*'.[88]

A structured note is further described as:

'*a debt obligation – basically like an IOU from the issuing investment bank – with an embedded derivative component; in other words, it invests in assets via derivative instruments'*.[89]

The Arbiter notes that various fact sheets of structured notes that featured in the respective portfolio of the Complainants, which fact sheets were presented by some of the complainants and others actually sourced by the Office of the Arbiter for Financial Services ('OAFS'), highlighted a number of risks in respect of the capital invested into these products.

Apart from *inter alia* the credit risk of the issuer and the liquidity risk, various fact sheets of such structured products also highlighted risk warnings about the notes not being capital protected, warning that the investor could possibly receive less than the original amount invested, or potentially even losing all of the investment.

[88] https://www.investopedia.com/terms/s/structurednote.asp
[89] https://www.investopedia.com/articles/bonds/10/structured-notes.asp

A particular frequent feature emerging of the type of structured notes invested into, involved the application of capital buffers and barriers. In this regard, various fact sheets of different structured products described and included warnings that the invested capital was at risk in case of a particular event occurring. Such event typically comprised a fall, observed on a specific date of more than a percentage specified in the respective fact sheet, in the value of any underlying asset to which the structured note was linked.

The fall in value would typically be observed on maturity/final valuation of the note. The specified percentage in the fall in value typically ranged between 40%, 50% or 60% of the initial value. The underlying asset to which the structured notes were linked typically comprised stocks or indices.

The said fact sheets further included a warning, on the lines of, '*If any stock has fallen by more than 50% (a Barrier breach) then investors receive the performance of the Worst Performing Stock at Maturity, and capital will be lost*'.[90] Such features and warnings featured, in essence, in the fact sheets issued by different providers including notes issued by RBC, Commerzbank, Nomura and BNP Paribas which featured respectively in numerous portfolios.

It is, accordingly, clear that there were certain specific risks in various structured products invested into and there were material consequences if just one asset, out of a basket of assets to which the note was linked, fell foul of the indicated barrier. **The implication of such a feature should have not been overlooked nor discounted. Given the particular features of the structured notes invested into, neither should have comfort been derived regarding the adequacy of such products just from the fact that the structured notes were linked to a basket of fully quoted shares (or recognised indices), as at times implied by the Service Provider during its submissions.**

It is particularly revealing to note the statements made by Trafalgar itself, in its email communication dated 17 September 2017 to CWM **wherein MPM was in**

[90] Example – Fact Sheet of the RBC Festive Income Note (ISIN No. XS1000868247) - sourced from https://www.portman-associates.com/wp-content/uploads/2013/11/RBC-Festive-Fixed-Income-FACTSHEET.pdf - which featured in the portfolio of Case 116/2018 (*A fol. 36*).

copy, and which communication was presented in Case Number 185/2018 against MPM.

In the said case, MPM did not contest that such communication was untrue or did not exist, but only challenged the way in which the said email was obtained by the complainant.

The email sent by Trafalgar's official *inter alia* stated the following:

'***Structured Notes – It is my opinion we need to get as far away from these vehicles as possible. They have no place in an uneducated investor's portfolio and when they breech their barriers untold amounts of damage is done***'.[91]

Such a statement indeed summarily highlighted the pertinent issues with respect to investments in structured notes which are relevant to the case in question.

Excessive exposure to structured products and to single issuers

As indicated above, the portfolio of investments in respect of the Complainants at times comprised solely and/or predominantly of structured products. Such excessive exposure to structured products occurred over a long period of time sometimes even spanning a number of years or even throughout the whole period during which CWM was acting as investment adviser. This clearly emerges from the Table of Investments forming part of the '*Investor Profile*' provided by the Service Provider for the respective Complainants.

In addition, the said table respectively indicates investments resulting in high exposures to the same single issuer/s, either through a singular purchase and/or through cumulative purchases in products issued by the same issuer.

In defence to criticism on high exposures to single issuers, in some cases the Service Provider described that the issuer was at times '*one of Germany's largest banking institutions*'[92] or '*one of Canada's largest banks*'.[93]

[91] Emphasis added by the Arbiter.
[92] Referred to in Case 068/2018 – *A fol.* 267
[93] Referred to in a case which is dealt with separately, numbered Case 164/2018 – *A fol.* 140

The Arbiter does not, however, consider this to justify or make the high exposure to single issuers acceptable even more in the Scheme's context. The maximum limits relating to exposures to single issuers outlined in the MFSA rules and MPM's own Investment Guidelines did not make any distinctions according to the standing of the issuer.

Hence, the maximum exposure limits to single counterparties should have been applied and ensured that they are adhered to across the board. The credit risk of the respective issuer was indeed still one of the risks highlighted in various fact sheets, as presented to or sourced by the OAFS, of structured products invested into.

Portfolio not reflective of the MFSA rules

The high exposure to structured products as well as high exposure to single issuers, which was allowed to occur by the Service Provider in the Complainants' respective portfolio, jars with the regulatory requirements that applied to the Retirement Scheme at the time, particularly Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002'*, ('the Directives') which applied from the Scheme's inception in 2011 until the registration of the Scheme under the RPA on 1 January 2016.

The applicability and relevance of these conditions to the case in question was highlighted by MPM itself.[94]

SOC 2.7.1 of Part B.2.7 of the Directives required *inter alia* that the assets were to '*be invested in a prudent manner and in the best interest of beneficiaries …*'.

SOC 2.7.2 in turn required the Scheme to ensure *inter alia* that, the assets of a scheme are '*invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole*'[95] and that such assets are '*properly*

[94] Para. 21 & 23 of the Note of Submissions filed by MPM in 2019.
[95] SOC 2.7.2 (a)

diversified in such a way as to avoid accumulations of risk in the portfolio as a whole'.[96]

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be '*predominantly invested in regulated markets*';[97] to be '*properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings'*[98] where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme.[99]

Despite the standards of SOC 2.7.2, MPM allowed the portfolio of the respective Complainant to, at times, comprise solely and/or predominantly of structured products. Individual exposures to single issuers were typically much higher than 20% (this being the maximum limit applied in the Rules to diversified investment instruments, such as collective investment schemes whose performance was not materially impacted or determined by a single underlying asset); and, in various numerous cases, even higher than 30%, the latter being the maximum limit applied in the Rules to relatively safer investments such as deposits as outlined above.

The structured products invested into were also not indicated, during the proceedings of this case, as themselves being traded in or dealt on a regulated market. The respective portfolio also included, at times, material positions (either individually and/or on a cumulative basis) into high risk investments. The high risk is reflected in the high rate of returns of 7%, 8%, 9% or 10% p.a. which featured in the name of various structured products invested into.

[96] SOC 2.7.2 (b)
[97] SOC 2.7.2 (c)
[98] SOC 2.7.2 (e)
[99] SOC 2.7.2 (h)(iii) & (v)

*Portfolio not reflective of MPM's **own** Investment Guidelines*

In its submissions MPM produced a copy of the Investment Guidelines marked '*January 2013*' and '*Mid-2014*', which guidelines featured in the Application Form for Membership, and also Investment Guidelines marked '*2015', '2016*', *'Mid-2017',* '*Dec-2017*' and '*2018*' where, it is understood that the latter also formed part of the Scheme's documentation such as the Scheme Particulars issued by MPM.

Despite that the Service Provider claimed that the investments made were in line with the Investment Guidelines, **MPM has, however, not adequately proven such a claim**.

As indicated, the investment portfolios in the cases reviewed in this decision were at times either solely and/or predominantly invested in structured notes for a long period of time. It is unclear how such a portfolio composition truly satisfied certain conditions specified in MPM's own Investment Guidelines such as:

(i) **The requirement that the member's assets had to be '*predominantly invested in regulated markets*'**.

This was a condition which prevailed in all of the presented MPM's Investment Guidelines since January 2013 till that of 2018.[100]

The said requirement of being '*predominantly invested in regulated markets*' meant, and should have been construed to mean, that investments had to be predominantly invested in listed instruments, that is financial instruments that were admitted to trading. With reference to industry practice, the terminology of '*regulated markets*' is referring to a regulated exchange venue (such as a stock exchange or other regulated exchange). The term '*regulated markets*' is in fact commonly referred to, defined and applied in various EU Directives relating to financial services, including diversification rules applicable on other regulated financial

[100] Investment Guidelines attached to the affidavit of Stewart Davies.

products.[101] Hence, the interpretation of '*regulated markets*' has to be seen in such context.

The reference to '*predominantly invested in regulated markets*' cannot accordingly somehow be interpreted as referring to the status of the issuers of the products, as was confusingly argued by the Service Provider in one particular case, when it stated in its reply that '*Structured Notes are issued from regulated markets, by issuers who are regulated and are traded*'.[102] On the contrary, it is typically the product itself which has to be traded on the regulated market and not the issuer of the product.

Moreover, a look through approach, could not either be sensibly applied to the structured notes for the purposes of such condition taking into consideration the nature and particular features of the structured notes invested into.

No evidence was submitted that predominantly the portfolio, which at times comprised solely or predominantly of structured notes, constituted listed structured notes. Several fact sheets sourced of the structured notes and other relevant fact sheets presented by some of the complainants, actually indicated that the products in question were not listed on an exchange.

On its part the Service Provider did not prove that the respective portfolio of the Complainants was '*predominantly invested in regulated markets*' on an ongoing basis.

Furthermore, when investment in unlisted securities was itself limited to 10% of the Scheme assets, as stipulated throughout MPM's own Investment Guidelines for 2013 to 2018, it is unclear how the Trustee and Scheme Administrator chose to allow much higher exposures (as will be indicated further below) to structured notes, a debt security, which were themselves unlisted.

[101] Such as UCITS schemes - the Undertakings for Collective Investments in Transferable Securities (UCITS) Directive (Directive 2009/65/EC as updated). The Markets in Financial Instruments Directive (MiFID) (Directive 2004/39/EC as repealed by Directive 2014/65/EU) also includes a definition as to what constitutes a '*regulated market'.*

[102] Case 172/2018 - *A fol.* 71

(ii) **The requirement relating to the liquidity of the portfolio.**

The Investment Guidelines of MPM marked January 2013 required no more than a '*maximum of 40% of the fund*[103] *in assets with liquidity of greater than 6 months*'. This requirement remained, in essence, also reflected in the Investment Guidelines marked '*Mid-2014'* which read '*Has a maximum of 40% of the fund in assets with expected liquidity of greater than 6 months*', as well as in the subsequent Investment Guidelines marked 2015 till 2018 which were updated by MPM and tightened further to read a '*maximum of 40% of the fund in assets with expected liquidity of greater than 3 months but not greater than 6 months*'.

It is evident that the scope of such requirement was to ensure the liquidity of the portfolio as a whole by having the portfolio predominantly (that is, at least 60%) exposed to liquid assets which could be easily redeemed within a short period of time, that is 3-6 months (as reflected in the respective conditions) whilst limiting exposure to those assets which take longer to liquidate to no more than 40% of the portfolio.

With reference to the Complainants' portfolio, it is noted that the structured notes invested into typically had a maturity or investment term of 1-2 years and at times even higher up to 5 years as evidenced in the various product fact sheets sourced. The bulk of the assets within the policy was, at times, invested into just one or very few structured notes. It is unclear how the 40% maximum limit referred to above could have been satisfied in such circumstances where the portfolio was predominantly invested into structured notes which themselves had long investment terms.

It is further noted that the various fact sheets of the unlisted structured products sourced included reference to the possibility of a secondary market existing for such structured notes. In this regard, a buyer had to be found in the secondary market in case one wanted to redeem a holding into such structured note prior to its maturity.

[103] The reference to '*fund'* is construed to refer to the member's portfolio.

The secondary market could, however, not have provided an adequate level of comfort with respect to liquidity.

There were indeed various risks highlighted in relation to the secondary market as amply reflected in the risk warnings emerging in the various product fact sheets sourced.

The said risk warnings highlighted the risks related to the availability of such market (as the secondary market had to be in the first place offered by the issuer), as well as the limitations of the said market. They also highlighted the lower price that could be sought on this market.

In this regard, there was the risk that the price of the structured note on the secondary market could be well below the initial capital invested.

For example, the notes issued by RBC typically included the risk disclaimer that:

'***Any secondary market provided by Royal Bank of Canada is subject to change and may be stopped without notice and investors may therefore be unable to sell or redeem the Notes until their maturity. If the Notes are redeemed early they may be redeemed at a level less than the amount originally invested***'.

Similar warnings feature in the fact sheets of structured notes issued by other issuers.

MPM should have been well aware about the risks associated with the secondary market. It has indeed itself seen the material lower value that could be sought on such market in respect of the structured notes invested into.

The lower values of the structured notes on the secondary market was indeed affecting the value of the Scheme as can be deduced from the respective Annual Member Statements that MPM itself produced.

Hence, no sufficient comfort about liquidity could have possibly been derived with respect to the secondary market in case of unlisted structured notes.

The Arbiter is not accordingly convinced that the conditions relating to liquidity were being adequately adhered to, nor that the required prudence was being exercised with respect to the liquidity of the portfolio, when considering the above mentioned aspects and when keeping into context that the portfolio of investments that was allowed to develop within the Retirement Scheme was at times solely and/or predominantly invested in the said structured notes.

Even if one had to look at the composition of the respective portfolio purely from other aspects, there is still undisputable evidence of non-compliance with other requirements detailed in MPM's own Investment Guidelines. This is particularly so with respect to the requirements applicable regarding the proper diversification, avoidance of excessive exposure and permitted maximum exposure to structured notes and/or single issuers.

Table A below shows just one example, for each of the indicated complainant, of excessive single exposures allowed within the respective portfolios at the time of purchase of the respective products.

Other instances of excessive exposures may exist within the respective portfolios and were indeed frequently found in various portfolios. The excessive exposure to single counterparties clearly emerges from the respective '*Table of Investments*' forming part of the '*Investor Profile*' produced by MPM as part of its submissions.

Table A – Example of Excessive Exposures to a Single Issuer of Structured Notes ('SNs')

Case No.	*Exposure to single issuer in % terms of the policy value at time of purchase*	*Issuer*	*Description*
Case 028/	Approx. or over 35%	Notenstein	3 SNs issued by Notenstein two of which were purchased in mid-July 2015 and another shortly after in early August 2015. The 3 SNs

Case No.	*Exposure to single issuer in % terms of the policy value at time of purchase*	*Issuer*	*Description*
2018			respectively comprised 12.65%, 10.54% and 12.72% of the policy value at the time of purchase thus resulting in an overall exposure to the same issuer of approximately, or over, 35% of the policy value.
Case 036/ 2018	Approx. or over 32%	EFG	2 SNs issued by EFG purchased both in October 2014 respectively constituted 15.56%, and 16.74% of the policy value at the time of purchase. Another SN issued by EFG (having collateral secured instruments - COSI) was, in addition, also purchased in October 2014 with such additional SN constituting 13.89% of the policy value at the time of purchase.
Case 040/ 2018	60.65%	RBC	2 SNs both issued by RBC purchased both in June 2013 constituted 36.54% and 24.11% respectively thus resulting in an overall exposure to RBC of 60.65% of the policy value at the time of purchase.
Case 043/ 2018	81.13%	Commerzbank	1 SN issued by Commerzbank constituted 81.13% of the policy value at the time of purchase in Nov 2013.
Case 052/ 2018	98.06%	RBC	2 SNs both issued by RBC purchased in August 2013 respectively constituted 49.03% each of the policy value at the time of purchase thus resulting in an overall exposure to the same issuer of 98.06% of the policy value.

Case No.	*Exposure to single issuer in % terms of the policy value at time of purchase*	*Issuer*	*Description*
Case 068/ 2018	87.18%	Commerzbank	2 SNs both issued by Commerzbank purchased in July 2013 respectively constituted 43.59% each of the policy value at the time of purchase thus resulting in an overall exposure to the same issuer of 87.18% of the policy value.
Case 070/ 2018	34%	Leonteq TCM	2 SNs both issued by Leonteq TCM purchased in May 2015 respectively constituted 16% and 18% of the policy value at the time of purchase thus resulting in an overall exposure to the same issuer of 34% of the policy value.
Case 072/ 2018	33.57%	Commerzbank	1 SN issued by Commerzbank purchased in September 2014 comprised 33.57% of the policy value at the time of purchase.
Case 080/ 2018	33.88%	Leonteq DBS	2 SNs both issued by Leonteq DBS purchased in July 2015 respectively constituted 18.82% and 15.06% of the policy value at the time of purchase thus resulting in an overall exposure to the same issuer of 33.88% of the policy value.
Case 081/ 2018	38.24%	Commerzbank	*Portfolio for male complainant:* 1 SN issued by Commerzbank constituted 38.24% of the account value at the time of purchase in March 2013.

Case No.	*Exposure to single issuer in % terms of the policy value at time of purchase*	*Issuer*	*Description*
	56.07%	EFG	*Portfolio for female complainant:* 2 SNs both issued by EFG and purchased in June 2015 respectively constituted 35.04%, and 21.03% of the policy value at the time of purchase thus resulting in an overall exposure to the same issuer of 97% of the policy value.
Case 090/ 2018	32.91%	EFG	1 SN issued by EFG constituted 32.91% of the policy value at the time of purchase in December 2014.
Case 091/ 2018	34%	Leonteq	2 SNs both issued by Leonteq and purchased in November 2014 respectively constituted 17% each of the policy value at the time of purchase thus resulting in an overall exposure to the same issuer of 34% of the policy value.
Case 092/ 2018	36.41%	Commerzbank	1 SN issued by Commerzbank constituted 36.41% of the account value at the time of purchase in February 2015.
Case 093/ 2018	29.63%	Nomura	1 SN issued by Nomura constituted 29.63% of the policy value at the time of purchase in June 2014.
Case 095/ 2018	35%	EFG	2 SNs issued by EFG and both purchased in June 2015 respectively constituted 19%, and 16% of the policy value at the time of purchase thus resulting in an overall exposure to the same issuer of 35% of the policy value.

Case No.	*Exposure to single issuer in % terms of the policy value at time of purchase*	*Issuer*	*Description*
Case 102/ 2018	33.89%	Leonteq TCM	2 SNs issued by Leonteq TCM and both purchased in December 2014 respectively constituted 17.23%, and 16.66% of the policy value at the time of purchase thus resulting in an overall exposure to the same issuer of 33.89% of the policy value.
Case 103/ 2018	33.35%	Commerzbank	1 SN issued by Commerzbank constituted 33.35% of the policy value at the time of purchase in January 2015.
Case 104/ 2018	74.86%	RBC	2 SNs both issued by RBC and purchased in August 2013 respectively constituted 37.43% each of the policy value at the time of purchase thus resulting in an overall exposure to the same issuer of 74.86% of the policy value.
Case 105/ 2018	97%	RBC	*Portfolio for male complainant:* 2 SNs both issued by RBC and purchased in February 2013 respectively constituted 29%, and 68% of the policy value at the time of purchase thus resulting in an overall exposure to the same issuer of 97% of the policy value.
	33.76%	Leonteq TCM	*Portfolio for female complainant:* 2 SNs both issued by Leonteq TCM and purchased in April 2015 respectively constituted 11.25%, and 22.51% of the policy

Case No.	*Exposure to single issuer in % terms of the policy value at time of purchase*	*Issuer*	*Description*
			value at the time of purchase thus resulting in an overall exposure to the same issuer of 33.76% of the policy value.
Case 106/ 2018	50%	Commerzbank	1 SN issued by Commerzbank constituted 50% of the policy value at the time of purchase in June 2015.
Case 108/ 2018	39.79%	EFG	*Portfolio for male complainant:* 3 SNs all issued by EFG and all purchased in February 2015 respectively constituted 11.97%, 10.92% and 16.90% of the policy value at the time of purchase thus resulting in an overall exposure to the same issuer of over 39% of the policy value.
	37.58%	Commerzbank	*Portfolio of female complainant:* 1 SN issued by Commerzbank constituted 37.58% of the policy value at the time of purchase in October 2013.
Case 109/ 2018	34.93%	Leonteq	1 SN issued by Leonteq constituted 34.93% of the policy value at the time of purchase in July 2015.
Case 116/ 2018	98%	Commerzbank	1 SN issued by Commerzbank constituted 98% of the policy value at the time of purchase in May 2013.

Case No.	*Exposure to single issuer in % terms of the policy value at time of purchase*	*Issuer*	*Description*
Case 118/ 2018	Approx. or over 33.85%	Leonteq TCM	3 SNs issued by Leonteq TCM purchased respectively two in February and another in April 2015 respectively comprising 16.27%, 17.58% and 6.20% of the policy value at their respective time of purchase.
Case 127/ 2018	33.35%	Nomura	1 SN issued by Nomura constituted 33.35% of the policy value at the time of purchase in July 2014.
Case 128/ 2018	32.50%	Commerzbank	1 SN (Commerzbank 10% P.A. GBL Health) issued by Commerzbank constituted 32.50% of the policy value at the time of purchase in August 2014.
Case 130/ 2018	36.65%	RBC	2 SNs both issued by RBC and both purchased in April 2014 constituted respectively 12.22% and 24.43% of the policy value at the time of purchase resulting in an overall exposure to the same issuer of 36.65% at the time.
Case 138/ 2018	Over 35%	EFG	*Portfolio of male complainant:* 3 SNs issued by EFG purchased respectively between January and August 2015 respectively comprising 8.15%, 26.05% and 34.95% of the policy value at their respective time of purchase.

Case No.	*Exposure to single issuer in % terms of the policy value at time of purchase*	*Issuer*	*Description*
	75.49%	EFG	*Portfolio of female complainant:* 2 SNs issued by EFG and both purchased in June 2016 constituted respectively 18.87% and 56.62% of the policy value at the time of purchase resulting in an overall exposure to the same issuer of 75.49% at the time.
Case 140/ 2018	80.24%	EFG	2 SNs issued by EFG and both purchased in June 2015 respectively comprised 30.09% and 50.15% of the policy value at the time of purchase resulting in an overall exposure to the same issuer of 80.24% at the time.
Case 167/ 2018	98.42%	Commerzbank	2 SNs issued by Commerzbank and both purchased in August 2013 respectively comprised 50.26% and 48.16% of the policy value at the time of purchase resulting in an overall exposure to the same issuer of 98.42% at the time.
Case 171/ 2018	31.03%	Leonteq	1 SN issued by Leonteq constituted 31.03% of the policy value at the time of purchase in August 2015.
Case 172/ 2018	33.74%	EFG	3 SNs issued by EFG constituted respectively all purchased in January 2015 respectively comprised 19.97%, 8.80% and 4.97% of the policy value at the time of purchase resulting in an overall exposure to the same issuer of 33.74% at the time.

Case No.	*Exposure to single issuer in % terms of the policy value at time of purchase*	*Issuer*	*Description*
Case 184/ 2018	34.51%	Commerzbank	1 SN issued by Commerzbank constituted 34.51% of the policy value at the time of purchase in March 2014.
Case 034/ 2019	27.27%	EFG	3 SNs both issued by EFG constituted respectively 9.12%, 9.02% and 9.13% of the policy value at the time of purchase in June 2015 resulting in an overall exposure to the same issuer of 27.27% at the time.
Case 035/ 2019	29.58%	Commerzbank	1 SN issued by Commerzbank constituted 29.58% of the policy value at the time of purchase in June 2015.
Case 036/ 2019	35.09%	EFG	2 SNs both issued by EFG constituted respectively 19.31% and 15.78% of the policy value at the time of purchase in June 2015 resulting in an overall exposure to the same issuer of 35.09% at the time.
Case 045/ 2019	55.85%	Commerzbank AG	1 SN issued by Commerzbank AG constituted 55.85% of the policy value at the time of purchase in August 2013.
Case 050/ 2019	98.07%	Commerzbank	2 SNs both issued by Commerzbank constituted respectively 47.99% and 50.08% of the policy value at the time of purchase in July 2013 resulting in an overall exposure to the same issuer of 98.07% at the time.

Case No.	*Exposure to single issuer in % terms of the policy value at time of purchase*	*Issuer*	*Description*
Case 072/ 2019	45.30%	EFG	3 SNs all issued by EFG constituted respectively 13.62%, 14.24% and 17.44% of the policy value at the time of purchase all in April 2015 resulting in an overall exposure to the same issuer of 45.30% at the time.

Irrespective of whether any of the particular investments indicated had actually yielded a profit, as sometimes justified by the Service Provider in its submissions, **the fact that such high exposure to a single counterparty was allowed in the first place indicates, in itself, the lack of prudence and excessive exposure and risks to single counterparties that were allowed to be taken on a general level**.

The Arbiter notes that the Service Provider has along the years revised various times the investment restrictions specified in its own '*Investment Guidelines*' with respect to structured products, both in regard to maximum exposures to structured products and maximum exposure to single issuers of such products. The exposure to structured notes and their issuers was indeed progressively and substantially reduced over the years in the said Investment Guidelines.

The specified maximum limit of 66% of the portfolio value in structured notes having underlying guarantees which featured in the '*Investment Guidelines*' marked 2015[104] was reduced to 40% of the portfolio's value in the '*Investment Guidelines*' marked December 2017[105] and, subsequently, reduced further to 25% in the '*Investment Guidelines*' for 2018.[106]

[104] MPM's Investment Guidelines '*2015'* as attached to the affidavit of Stewart Davies
[105] MPM's Investment Guidelines '*Dec-2017*' as attached to the affidavit of Stewart Davies
[106] MPM's Investment Guidelines '*2018'* as attached to the affidavit of Stewart Davies

Similarly, the maximum exposure to single issuers for '*products with underlying guarantees*', was in the '*Investment Guidelines*' marked Mid-2014 and 2015, specifically limited to no more than (33.33%), one third of the portfolio. The maximum limit to such products was subsequently reduced to 25%, one quarter of the portfolio, in the '*Investment Guidelines'* marked 2016[107] and mid-2017,[108] reduced further to 20% in the '*Investment Guidelines*' marked December 2017 and subsequently to 12.5% in the '*Investment Guidelines*' for 2018. Even before the Investment Guidelines of Mid-2014, MPM's Investment Guidelines of January 2013 still limited exposure to individual investments (aside from collective investment schemes) to 20%.

Apart that it has not been demonstrated that the structured products invested into had underlying guarantees, in the cases reviewed,[109] there was one or more instances where the extent of exposures to single issuers was even higher than one third of the policy value as indicated in the above Table. There is clearly no apparent reason, from a prudence point of view, justifying such high exposures to single issuers.

Indeed, the Arbiter considers that the high exposure to structured products and single issuers in the Complainants' respective portfolio jarred and did not reflect to varying degrees with one or more of MPM's own investment guidelines applicable at the time when the investments were made, most particularly with respect to the following guidelines:[110]

Investment Guidelines marked 'January 2013':
○ ***Properly diversified*** *in such a way as to* ***avoid excessive exposure****:*
▪ *If* ***individual investments*** *or equities are considered then* ***not more than 20% in any singular asset****, aside from collective investments.*
▪ *…*

[107] MPM's Investment Guidelines '*2016*' as attached to the affidavit of Stewart Davies
[108] MPM's Investment Guidelines 'Mid-2017' as attached to the affidavit of Stewart Davies
[109] Except for Case 036/2018, 090/2018, 093/2018, 128/2018, 171/2018, 034/2019 and Case 035/2019.
[110] Emphasis in the mentioned guidelines added by the Arbiter.

▪ ***Singular structured products should be avoided due to the counterparty risk*** *but are acceptable as part of an overall portfolio.*
Investment Guidelines marked 'Mid-2014':
• *Where **products with underlying guarantees** are chosen, **no more than one third of the overall portfolio to be subject to the same issuer default risk**.*
*In addition, **further consideration needs to be given to** the following factors:* • *…* • ***Credit risk of underlying investment*** • *…* *…*
• *In addition to the above, the portfolio must be constructed in such a way as to **avoid excessive exposure**:* • *...* • ***To any single credit risk***
Investment Guidelines marked '2015':
• *Where products with underlying guarantees are chosen, i.e. **Structured Notes**, these will be **permitted up to a maximum of 66% of the portfolio's values**,*
*with **no more than one third** of the portfolio to be **subject to** the **same issuer default risk**.*
*In addition, **further consideration needs to be given to** the following factors:* • *…* • ***Credit risk of underlying investment*** • *…*

…

• *In addition to the above, the portfolio must be constructed in such a way as to **avoid exposure**:*
  • *…*
  • ***To any single credit risk**.*

<u>Investment Guidelines marked '2016' & 'Mid-2017':</u>
• *Where **products with underlying Capital guarantees** are chosen, **i.e. Structured Notes**, these will be **permitted up to a maximum of 66% of the portfolio's values**,*
*with **no more than one quarter** of the portfolio to be **subject to** the **same issuer/ guarantor default risk**.*
• ***Where no such Capital guarantee exists**, investment will be **permitted up to a maximum of 50% of the portfolio's value**.* *…*

• *In addition, **further consideration needs to be given to** the following factors:*
  • *…*
  • ***Credit risk of underlying investment**;*
…

• *In addition to the above, the portfolio must be constructed in such a way as to **avoid exposure**:*
  • *…*
  • ***To any single credit risk**.*

Besides the mentioned excessive exposure to single issuers, it is also noted that additional investments into structured notes were observed[111] to have been allowed to occur within the respective portfolio, in excess of the limits allowed on the maximum exposure to such products. MPM's Investment Guidelines of 2015, 2016 and mid-2017 specifically mentioned a maximum limit of 66% of the portfolio value to structured notes.

In all the cases reviewed the Service Provider still continued to allow further investments into structured products at one or more instances when the said limits should have applied. The additional investments also occurred despite the portfolio being already exposed to structured notes more than the said percentage at the time when the additional purchase was being made.

In the reply the Service Provider sent in relation to the Complainants' formal complainant, MPM typically stated that:

'***In relation to investments, Momentum's role as a RSA and Trustee is to ensure the Scheme's investments are managed in accordance with relevant legislation and regulatory requirements, as well as in accordance with the Trust Deed and Rules and T&C***'.[112]

For the reasons amply explained, the Arbiter has no comfort whatsoever that the above has been truly achieved generally, and at all times, by MPM in respect of the Complainants' investment portfolio.

Portfolio invested into Structured Products ***Targeted for Professional Investors***

Besides the issues mentioned above, there is also the aspect relating to the nature of the structured products and whether the products allowed within the respective portfolio of the Complainants comprised structured notes aimed solely for professional investors.

The Service Provider has not claimed any of the Complainants as being professional investors.

[111] '*Table of Investments*' in the '*Investor Profile*' provided by MPM refers.
[112] Section 1, '*Background*'/'*Overview of the Scheme*' of MPM's formal reply to the complainant in relation to the complaint

The OAFS traced a number of Fact Sheets in respect of several structured products which featured in the portfolio of various complainants. The fact sheets in question were sourced by the OAFS through research undertaken over the internet with the specific ISIN number of the respective structured note featuring in the respective portfolio. The ISIN number for each structured product was obtained either from the '*Table of Investments*' forming part of the '*Investor Profile*' provided by the Service Provider or from the dealing instruction sheets presented by the respective complainant. Multiple fact sheets of different structured products have been sourced accordingly with respect to the Complainants' portfolios.[113]

The fact sheets traced by the OAFS from cases made against MPM, constituted over 45 different structured products issued by RBC, Nomura, Commerzbank or BNP Paribas.[114]

The fact sheets sourced from such parties specify that the products were targeted for professional investors only.

With respect to the structured products issued by RBC, for example, the fact sheets clearly indicate that such investments were '*For Professional Investors Only'* and *'not suitable for Retail distribution*' with the '*Target Audience*' for these products being specified as '*Professional Investors Only*' as outlined in the '*Key Features*' section of the respective fact sheet.

In some of its submissions, the Service Provider claimed that the references to '*Professional Investors only*' in the Fact Sheets referred to the marketed documentation. This is however not really the case as explained above and it is clear that such fact sheets were issued purposely for those investors who were eligible to invest in the product. It is also clear that such products were not aimed for retail investors but only for professional investors.

[113] Mostly from the site https://www.portman-associates.com/.

[114] Structured Notes with ISIN No: XS1240918372; XS1000868247; XS0994921129; XS0979786620; XS1116370088; XS1078174411; XS1092556452; XS1027521639; XS1048446188; XS0993405173; XS1064020271; XS1066900819; XS1057776392; XS1027492278; XS1203907164; XS1068540175; XS1400190465; XS0882837247; XS0964845266; XS1015499921; XS1003262729; XS0994241502; XS1240919933; XS0979778015; XS0993891091; XS1211647281; XS1193042451; XS0994225646; XS0948347835; XS1035007969; XS0954874672; XS0988283460; XS0993388650; XS0940655003; XS0962806377; XS0964863590; XS0933152513; XS0932055618; XS1169794978; XS0993382703; XS1029885586; XS1237269870; XS1061646060; XS1076544029; XS1078199160; XS1015512533;

The Service Provider has, in the majority of the cases reviewed, not produced any fact sheets of the structured notes that were invested into in the respective portfolio.[115] Neither were fact sheets targeted for retail investors, in respect of the structured notes typically included in the respective portfolios, presented by MPM.

Whilst the OAFS could not verify that all the investments within the Complainants respective portfolio were all targeted for professional investors, the multitude of relevant fact sheets traced by the OAFS in various portfolios is, in itself, indicative of a trend taken by the Service Provider in allowing products aimed solely for professional investors to be included in the portfolio of a retail client.

It is, therefore, considered that there is sufficient evidence resulting from multiple instances which show that the respective portfolio generally included investments not appropriate and suitable for a retail client. It is clear that there was a lack of consideration by the Service Provider with respect to the suitability and target investor of the structured notes.

Such lack of consideration is not reflective of the principle of acting with '*due skill, care and diligence*' and '*in the best interests of*' the members as the relevant laws and rules mentioned above obliged the Service Provider to do.

Other observations & synopsis

The Service Provider did not help its case by not providing detailed information on the underlying investments as already stated in this decision. Although the Service Provider filed a Table of Investments it did not provide adequate information to explain the portfolio composition and justify its claim that the portfolio was diversified. It did not generally provide fact sheets on the investments comprising the respective portfolios of the Complainants and it did not demonstrate the features and the risks attached to the investments.

The Service Provider's mere indication that, at times, it made in its submissions, that the respective portfolio was diversified through a number of

[115] A fact sheet in respect of one structured note was just produced in Case 090/2018.

structured notes with a range of issuers and with diversified listed underlyings cannot reasonably provide, in itself, sufficient and adequate comfort on the level of diversification/adequacy of such investments. Various other aspects cannot be ignored by the Service Provider.

Such aspects include, but are not limited to:

- the nature of the structured products being invested into and the effects any events or barriers that may form part of the key features of such products, would have on the investment if and when such events occur as already detailed above;

- the potential rate of returns as indicative of the level of risk being taken;

- the level of risks ultimately exposed to in the respective product and in the overall portfolio composition; and

- not the least, the issuer/counterparty risk being taken.

The extent of losses experienced on the capital of the complainants' respective portfolio, as indicated by MPM itself[116] is in itself indicative of the failure in adherence with the applicable conditions on diversification and avoidance of excessive exposures. Otherwise, material losses, which are reasonably not expected to occur in a pension product whose scope is to provide for retirement benefits, would have not occurred.

Apart from the fact that no sensible rationale has emerged for limiting the composition of the respective pension portfolio solely and/or predominantly to structured products at times, no adequate and sufficient comfort has either emerged that such composition reflected the prudence expected in the structuring and composition of a pension portfolio. Neither that the allocations were in the best interests of the Complainants despite their respective risk profile. In the context of the Scheme's objective, this is considered to also hold true for those who had indicated a higher risk profile.

[116] '*Investor Profile'* attached with the Additional Submissions made by MPM in 2019.

In the circumstance where the portfolio of the Complainants was at times solely and/or predominantly invested in structured products with a high level of exposure to single issuer/s, and for the reasons amply explained above, the Arbiter does not consider that there was proper diversification nor that the portfolio was at all times '*invested in order to ensure the security quality, liquidity and profitability of the portfolio as a whole*'[117] and '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.[118]

Apart from the fact that the Arbiter does not have comfort that the respective portfolio was reflective of the conditions and investment limits outlined in the MFSA's Rules and MPM's own Investment Guidelines, **it is also being pointed out that over and above the duty to observe specific maximum limits relating to diversification as may have been specified by rules, directives or guidelines applicable at the time, the behaviour and judgement of the Retirement Scheme Administrator and Trustee of the Scheme is expected to, and should have gone beyond compliance with maximum percentages and was to, in practice, reflect the spirit and principles behind the regulatory framework and in practice promote the scope for which the Scheme was established.**

The excessive exposure to structured products and their issuers nevertheless clearly departed from such principles and cannot ultimately be reasonably considered to satisfy and reflect in any way a suitable level of diversification nor a prudent approach.

This is even more so when considering the crucial aim of a retirement scheme being that to provide for retirement benefits – an aspect which forms the whole basis for the pension legislation and regulatory framework to which the Retirement Scheme and MPM were subject to. The provision of retirement benefits was indeed the Scheme's sole purpose as reflected in the Scheme Particulars.

[117] SOC2.7.2(a) of Part B.2.7 of the Directives.
[118] SOC2.7.2(b) of Part B.2.7 of the Directives.

C. <u>The Provision of information</u>

With respect to reporting to the member of the Scheme, MPM mentioned and referred only to the Annual Member Statement in its submissions. The said annual statements issued by the Service Provider to the Complainants are however highly generic reports which only listed the underlying life assurance policy (or the account held with Capital Platforms Pte Ltd in Case 092/2018) and included no details of the underlying investments such as the structured notes comprising the portfolio of investments.

Hence, the extent and type of information sent to the respective Complainant by MPM as a member of the Scheme in respect of their respective underlying investments is considered to have been lacking and insufficient.

SOC 9.3(e) of Part B.9 of the Pension Rules for Personal Retirement Schemes of 1 January 2015 already provided that, in respect of member directed schemes,

'*a record of all transactions (purchases and sales) occurring in the member's account during the relevant reporting period should be provided by the Retirement Scheme Administrator to the Member at least once a year and upon request …*'. [119]

It is noted that the Pension Rules for Personal Retirement Schemes under the RPA became applicable to MPM on 1 January 2016 and that, as per the MFSA's communications presented by MPM,[120] Part B.9 of the said rules did not become effective until the revised rules issued in 2018.

Nevertheless, it is considered that even where such condition could have not strictly applied to the Service Provider from a regulatory point of view, the Service Provider as a Trustee, obliged by the TTA to act as a *bonus paterfamilias* and in the best interests of the members of the Scheme, should have felt it its duty to provide members with detailed statements and information on the underlying investments.

[119] The said condition was further revised and updated as per condition 9.5(e) of Part B.9 of the Pension Rules for Personal Retirement Schemes indicated as *'Issued: 7 January 2015, Last updated: 28 December 2018'*.
[120] MFSA's letter dated 11 December 2017, attached to the Note of Submissions filed by MPM in 2019.

Moreover, prior to being subject to the regulatory regime under the RPA, the Service Provider was indeed already subject to regulatory requirements relating to the provision of adequate information to members such as the following provisions under the SFA framework:

- Standard Operating Conditions 2.6.2 and 2.6.3 of Section B.2 of the Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002[121] respectively already provided that:

  '2.6.2 *The Scheme Administrator shall act with due skill, care and diligence in the best interests of the Beneficiaries. Such action shall include:*

  …

  b) ensuring that contributors and prospective contributors are provided with adequate information on the Scheme to enable them to take an informed decision…';

  '2.6.3 *The Scheme Administrator shall ensure the adequate disclosure of relevant material information to prospective and actual contributors in a way which is fair, clear and nor misleading. This shall include:*

  …

  b) reporting fully, accurately and promptly to contributors the details of transactions entered into by the Scheme …'.

There is no apparent and justified reason why the Service Provider did not report itself on key information such as the composition of the underlying investment portfolio, which it had in its hands as the trustee of the underlying life assurance policy respectively held in respect of each Complainant (or the QROPS account in Case 092/2018).

[121] Condition 2.2 of the Certificate of Registration issued by the MFSA to MPM dated 28 April 2011 included reference to Section B.2 of the said Directives.

The general principles of acting in the best interests of members and those relating to the duties of trustee as already outlined in this decision[122] and to which MPM was subject to, should have prevailed and should have guided the Service Provider in its actions to ensure that the respective member was provided with an adequate account of the underlying investments within his/her portfolio.

The provision of adequate details on the underlying investments could have ultimately enabled the Complainants to highlight much earlier any issues with respect to the transactions undertaken and in that way they could not have complained that their signature on dealing instructions had been forged, scanned or photocopied.[123]

The matter relating to the dealing instructions was only raised by the Complainants when it was too late for any concrete action to be taken to stop the alleged practice as CWM had already ceased trading by then.

Causal link and Synopsis of main aspects

The actual cause of the losses experienced by the Complainants on their respective accounts within the Retirement Scheme **cannot** just be attributed to the under-performance of the investments as a result of general market and investment risks and/or the issues alleged against one of the structured note providers, as MPM has *inter alia* suggested in these proceedings.

There is sufficient and convincing evidence of deficiencies on the part of MPM in the undertaking of its obligations and duties as Trustee and Retirement Scheme Administrator of the Scheme as amply highlighted above which, at the very least, impinge on the diligence it was required and reasonably expected to exercise in such roles.

It is also evidently clear that such deficiencies prevented the losses from being minimised and in a way contributed in part to the losses experienced. The actions and inactions that occurred, as explained in this decision,

[122] The section titled '*Responsibilities of the Service Provider*'.
[123] Such allegation was made in all the indicated captioned cases except Case 072/2018, 093/2018, 130/2018, 167/2018, 171/2018, 172/2018 and Case 072/2019.

enabled such losses to result within the Scheme, leading to the Scheme's failure to achieve its key objective.

Had MPM undertaken its role adequately and as duly expected from it, in terms of the obligations resulting from the law, regulations and rules stipulated thereunder and the conditions to which it was subject to in terms of its own Retirement Scheme documentation as explained above, such losses would have been avoided or mitigated accordingly.

The actual cause of the losses is indeed linked to and cannot be separated from the actions and/or inactions of key parties involved with the Scheme, with MPM being one of such parties.

In the particular circumstances of the cases reviewed, the losses experienced on the Retirement Scheme are ultimately tied, connected and attributed to events that have been allowed to occur within the Retirement Scheme which MPM was duty bound and reasonably in a position to prevent, stop and adequately raise as appropriate with the Complainants.

Final Remarks

As indicated earlier, the role of a retirement scheme administrator and trustee does not end, or is just strictly and solely limited, to the compliance of the specified rules. The wider aspects of its key role and responsibilities as a trustee and scheme administrator must also be kept into context.

Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainants, the Retirement Scheme Administrator had clear duties to check and ensure that the portfolio composition recommended by the investment adviser provided a suitable level of diversification and was *inter alia* in line with the applicable requirements in order to ensure that the portfolio composition was one enabling the aim of the Retirement Scheme to be achieved with the necessary prudence required in respect of a pension scheme. The oversight function is an essential aspect in the context of personal retirement schemes as part of the safeguards supporting the objective of retirement schemes.

It is considered that, had there been a careful consideration of the contested structured products and extent of exposure to such products and their issuers, the Service Provider would and should have intervened, queried, challenged and raised concerns on the portfolio composition recommended and not allow the overall risky position to be taken in structured products as this ran counter to the objectives of the retirement scheme and was not in the Complainants best interests amongst others.

The Complainants ultimately relied on MPM as the Trustee and Retirement Scheme Administrator of the Scheme as well as other parties within the Scheme's structure, to achieve the scope for which the pension arrangement was undertaken, that is, to provide for retirement benefits and also reasonably expect a return to safeguard their pension.

Whilst losses may indeed occur on investments within a portfolio, a properly diversified and balanced and prudent approach, as expected in a pension portfolio, should have mitigated any individual losses and, at the least, maintain rather than substantially reduce the original capital invested.

For the reasons amply explained, it is accordingly considered that there was, at the very least, a clear lack of diligence by the Service Provider in the general administration of the Scheme in respect of the Complainants and in carrying out its duties as Trustee, particularly when it came to the dealings and aspects involving the appointed investment adviser; the oversight functions with respect to the Scheme and portfolio structure; as well as the reporting to the Complainants on their respective underlying portfolio.

It is also considered that there are various instances which indicate non-compliance by the Service Provider with applicable requirements and obligations as amply explained above in this decision. The Service Provider failed to act with the prudence, diligence and attention of a *bonus paterfamilias.*[124]

[124] Cap. 331 of the Laws of Malta, Art. 21(1)

The Arbiter also considers that the Service Provider did not meet the '*reasonable and legitimate expectations*'[125] of the Complainants who had placed their trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.

Conclusion

For the above-stated reasons, the Arbiter considers the complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case[126] and is accepting it in so far as it is compatible with this decision.

Cognisance needs to be taken however of the responsibilities of other parties involved with the Scheme and its underlying investments, particularly, the role and responsibilities of the investment adviser to the respective member of the Scheme. Hence, having carefully considered the case in question, the Arbiter considers that the Service Provider is to be only partially held responsible for the losses incurred.

Compensation

Being mindful of the key role of Momentum Pensions Malta Limited as Trustee and Retirement Scheme Administrator of the Momentum Malta Retirement Trust and in view of the deficiencies identified in the obligations emanating from such roles as amply explained above, which deficiencies are considered to have prevented the losses from being minimised and in a way contributed in part to the losses experienced on the Retirement Scheme, the Arbiter concludes that the Complainants should be compensated by Momentum Pensions Malta Limited for part of the net realised losses on their respective pension portfolio.

In the particular circumstances of this case, considering that the Service Provider had the last word on the investments and acted in its dual role of Trustee and Retirement Scheme Administrator, the Arbiter considers it fair, equitable and reasonable for Momentum Pensions Malta Limited, to be held

[125] Cap. 555, Article 19(3)(c)
[126] Cap. 555, Article 19(3)(b)

responsible for seventy per cent of the net realised losses sustained by the Complainants on their investment portfolio.

The Arbiter notes that the latest valuation and list of transactions provided by the Service Provider in respect of each Complainant is not current. Besides, no detailed breakdown was provided regarding the status and performance of the respective investments within the disputed portfolio of the respective Complainant.

The Arbiter shall accordingly formulate how compensation is to be calculated by the Service Provider for each Complainant for the purpose of this decision.

Given that the Complaint made by the Complainants principally relates to the losses suffered on the Scheme at the time of Continental Wealth Management acting as adviser, compensation shall be provided solely on the investment portfolio constituted under Continental Wealth Management.

With respect to Case 105/2018 (for the male complainant only), Case 106/2018 and Case 184/2018 the Arbiter notes that MPM noted in its additional submissions only, that the respective complainant received some form of (minimal) compensation from CWM or Trafalgar. Apart from the fact that the note of submissions is not intended for the parties to raise additional proofs or allegations, in any case such statements by the Service Provider were not backed by any proof in the respective cases and therefore cannot be considered by the Arbiter.

The Service Provider is accordingly being directed to pay the respective Complainant compensation equivalent to 70% of the sum of the Net Realised Loss incurred within the respective whole portfolio of underlying investments constituted under Continental Wealth Management and allowed by the Service Provider for each respective Complainant.

The Net Realised Loss calculated on such portfolio shall be determined as at the date of this decision and calculated as follows:

(i) For every such investment within the said portfolio which, at the date of this decision, no longer forms part of the respective Member's current investment portfolio (given that such investment

has matured, been terminated or redeemed and duly settled), it shall be calculated any realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised) inclusive of any realised currency gains or losses. Any realised loss so calculated on such investment shall be reduced by the amount of any total interest or other total income received from the respective investment throughout the holding period to determine the actual amount of realised loss, if any;

(ii) In case where an investment in (i) above is calculated to have rendered a profit after taking into consideration the amount realised (inclusive of any total interest or other total income received from the respective investment and any realised currency gains or losses), such realised profit shall be accumulated from all such investments and netted off against the total of all the realised losses from the respective investments calculated as per (i) above to reach the figure of the Net Realised Loss within the indicated portfolio.

The computation of the Net Realised Loss shall accordingly take into consideration any realised gains or realised losses arising within the portfolio, as at the date of this decision.

In case where any currency conversion/s is/are required for the purpose of (a) finally netting any realised profits/losses within the portfolio which remain denominated in different currencies and/or (b) crystallising any remaining currency positions initiated at the time of Continental Wealth Management, such conversion shall, if and where applicable, be made at the spot exchange rate sourced from the European Central Bank and prevailing on the date of this decision. Such a direction on the currency conversion is only being given in the very particular circumstances of such cases for the purpose of providing clarity and enabling the calculation of the compensation formulated in this decision and avoid future unnecessary controversy.

(iii) Investments which were constituted under Continental Wealth Management and are still held within the current portfolio of underlying investments as at, or after, the date of this decision are not the subject of the compensation stipulated above. This is without prejudice to any legal remedies the respective Complainant might have in future with respect to such investments.

In accordance with Article 26 (3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders Momentum Pensions Malta Limited to pay the indicated amount of compensation to each of the Complainants mentioned in this decision.

A full and transparent breakdown of the calculations made by the Service Provider in respect of the compensation as decided in this decision, should be provided to the respective Complainant.

With legal interest from the date of this decision till the date of payment.

Because of the novelty of this case each party is to bear its own legal costs of these proceedings.

Dr Reno Borg
Arbiter for Financial Services